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THE TRIAL OF A BIG CASE ON THE CRIMINAL SIDE

by

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The procedural problems in the trial of the Big Case have received a great deal of attention in recent years. The three basic studies of this subject have been devoted almost entirely to trials on the civil side.[1]

The Sherman Act, however, is a criminal statute. Yet on the criminal side it is almost a dead letter. There the Big Case is seldom found. The Act is in this condition largely because of the procedural difficulties that confront both Court and counsel in pre-trial and trial of a criminal case. These difficulties stem largely from the important constitutional provisions that protect a defendant in a criminal case and that do not exist or are relatively unimportant in a civil case.

There is the protection of the Fourth Amendment against unreasonable search and seizure; the privilege against self-incrimination and the due process clause of the Fifth Amendment; the right to a jury trial and the right to be confronted with the witnesses against him of the Sixth Amendment. All of these must be given full effect. The privilege against self-incrimination is so strong that not only may a defendant not be required to testify but it may even be error and call for a mistrial if, in the hearing of the jury, the prosecutor calls upon defense counsel to stipulate a fact. The criminal jury trial is conducted in a world apart from its civil counterpart. The differences are deeply rooted in our history and customs and are given effect in the constitutional text.

As a result of these constitutional protections, there is a lack of reciprocity between opposing parties in a criminal case. The government, on the one hand, possesses the enormous investigatory powers

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1 Report of the Judicial Conference on Procedure in Antitrust and Other Protracted Cases, dated September 26, 1951, 13 F. R. D. 62.

Report of the Committee on Practice & Procedure, Section of Antitrust Law, A. B. A., dated May 1, 1954.

Report of the Attorney General's National Committee to Study the Antitrust Laws dated March 31, 1955, pp. 362-366.

given to it by the grand jury and the important resources that the government possesses but, on the other hand, an individual stands fully protected by our Constitution against disclosure of his books, records and documents and against testimony under oath before or at trial. Since the Constitution protects the individual against discovery, if there is to be any liberal discovery it can only be against the government. If this added power is given to a defendant the scales may often be tipped far too much in his favor and the processes of the law frustrated if not defeated.

In the antitrust field, however, these important considerations should not be accepted as reasons for closing *any* effort on the criminal side to accomplish the avoidance of *unnecessary* volume of record, expense and delay in big criminal antitrust cases.

The fact is that the procedural developments in civil cases have been a direct result of the necessity that something be done if the big antitrust case was to be tried in Court at all. That same necessity exists in a criminal case unless we are to write off the Sherman Act as a dead letter so far as the Big Case is concerned.

Against this background it is proposed to run through the most important procedural developments on the civil side and contrast them with the situation in a criminal case.

First, pre-trial conferences. There is, of course, no pre-trial conference rule for criminal cases, but this would not prevent the Court from holding pre-trial conferences because power to confer with counsel and parties is an inherent judicial power. Rule 16 on the civil side is simply a restatement of a power that exists without the rule and it exists on the criminal side as well.

Next, what could be accomplished at these conferences? On the criminal side, very little could be accomplished apart from what the Court might obtain with the consent of all parties, a consent secured by the exercise of the persuasive power that the judiciary possesses and is so well equipped to exercise effectively—if it chooses to exercise it at all. We should not underestimate what might be done but the unwillingness of a trial judge to proceed in this way is understandable. It is important, too, that power stemming from the ability to persuade is inappropriate as well as wholly inadequate for the solution of the very real problems that confront Court and counsel in the trial of these cases.

This discussion is limited to big antitrust cases even though on the criminal side these are not the only big cases. There are big mail fraud trials, big conspiracy trials, big Communist trials and, recently, the big and exacting net worth income tax trials, but these trials would not have been improved in the slightest degree by the use of the pre-trial procedures that are becoming regular practice on the civil side. On the contrary, such conferences and discovery proceedings generally could lead to nothing but disaster and a defeat of justice. Chief Justice Vanderbilt's interesting opinion in a recent case[2] draws a sharp line between appropriate pre-trial and discovery procedures in criminal as against civil cases. This is surely correct. This discussion, let it be said again, is confined to trials under the Sherman Act.

The fact is that at pre-trial conferences in civil cases Court and counsel have developed, case by case, a variety of useful techniques tailored to the needs of the particular case. These are coming to be regular practice in civil cases. We shall compare them with what might reasonably be expected on the criminal side today.

First, if the pleadings are inadequate—and they often are—there is the important task of particularizing the issues to be tried. This is listed in Civil Rule 16 as the first order of business at a pre-trial conference. A variety of techniques have been worked out to do this. The Judicial Conference Report stresses that this should be done at pre-trial conferences well in advance of trial.[3] The American Bar Association Report and the recent Attorney General's Report both support this and urge that at these pre-trial conferences, first the plaintiff and later the defendant should be required to submit a detailed statement of the proposed issues.[4] The Attorney General's Report also proposes as an alternative method that the motion for a more definite statement under Rule 12(e) should be construed liberally in antitrust cases to require the plaintiff to state its charges in full and with adequate particularity.[5] The Attorney General's

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[2] *State* v. *Tune*, 13 N. J. 203, 98 Atl. 2d 881 (1953).

[3] Report of the Judicial Conference on Procedure in Antitrust and Other Protracted Cases, pp. 8-11, 13 F. R. D. 66-68.

[4] See Report of the Committee on Practice and Procedure, Section of Antitrust Law, A. B. A., dated May 1, 1954, pp. 18-21; Report of the Attorney General's National Committee to Study the Antitrust Laws, dated March 31, 1955, pp. 362-363.

[5] See Report of the Attorney General's National Committee to Study the Antitrust Laws, dated March 31, 1955, p. 363.

Report also proposes that interrogatories under Rule 33 should be used.[6] Interrogatories of this sort are quite different from those to discover evidence and should be treated as a means to discover and state issues of fact with sufficient particularity to permit efficient preparation for trial and trial itself. These interrogatories may be a preliminary to a pre-trial conference at which the uncertainties that are still found in the responses may be thrashed out before a final pre-trial order is entered.

On the criminal side if the charges in the indictment or information are too broad, the Court may be in a difficult position in disposing of defendant's motion for a bill of particulars under Criminal Rule 7(f).

As Judge Medina put it in a recent case:

> "How one can light upon particulars which help a defendant prepare his case [that is the interest of the defendant in securing the particulars] but do not compel disclosure of evidence [that is the interest of the government in these cases] or, contrary-wise, do not compel disclosure of evidence but help a defendant prepare his case, the authorities do not say." [7]

The precedents can furnish little help in that situation and, as the Court stated, these difficulties "probably derive from our not as yet having articulated the philosophy underlying disclosure and discovery proceedings in criminal cases, despite the progress made in civil cases . . ." [8]

That same difficult makes its reappearance in a different way at almost every point as we go along.

Second, these cases are usually documentary and in the big antitrust case the next most important task is making provisions for the handling of documents. A thorough job at pre-trial will make arrangements for the authentication of the documents, their marking and arrangement in accordance with the offering party's theory of his case, their disclosure to the opposing party in advance of trial, perhaps even their printing, and frequently the manner in which

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[6] *Ibid.*, p. 363.

[7] *United States* v. *The Metropolitan Leather & Findings Ass'n*, 82 F. Supp. 449, D. C. S. D. N. Y. (1949).

[8] *Ibid.*, p. 454.

they are to be offered and discussed at the trial. Here we give full effect to the plea of Judge Wyzanski in the *United Shoe Machinery* case that no party should be permitted to dump in the lap of the Court thousands of documents that had perhaps not even been read by counsel who offered them.[9]

On the civil side there are precedents worked out in many cases. A number of techniques have been worked out for the orderly handling of documents. This is now regular practice not only in government cases but in treble damage cases as well.[10]

On the criminal side there is no counterpart of rule, precedent or experience. The closest we come is Rule 16 of the Criminal Rules for the discovery and inspection by a defendant of documents in the hands of the government "obtained from or belonging to the defendant or obtained from others by seizure or by process," and Rule 17(c) for the use of a subpoena for the production of documents for inspection "at a time prior to the trial or prior to the time when they are to be offered in evidence." [11] It is fair to say that these two rules mark the outer limits of permissible discovery at the present time. In the *Bowman Dairy*[12] opinion in 1951 the Supreme Court sought to mark out the proper place of each of these rules in this limited scheme of discovery.

Neither Rules 16 or 17(c) would enable the Court to require the authentication of documents in advance of trial, their arrangement and presentation to the opposing party in advance of a trial or any of the other housekeeping arrangements that should now be regular procedure in a big civil case.

Therefore, on the criminal side the time-consuming work of authentication might have to be carried on, document by document,

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[9] *United States* v. *United Shoe Machinery Corporation*, Memorandum of Judge Wyzanski, April 13, 1950, 1948-51 Supp. C. C. H. Trade Reg. Rep. ¶62,631 (1950).

[10] For a collection of pre-trial orders in antitrust cases on this subject see the Appendix to the Report of the Committee on Practice & Procedure, Section of Antitrust Law, A. B. A. dated May 1, 1954.

[11] A few years before this procedure was put into the Criminal Rules in Rule 17(c) the government used it in the criminal trial of the three big tobacco companies before a jury in the Eastern District of Kentucky. In response to subpoenas masses of records were produced in Court in advance of trial and lodged with the Clerk. The government then moved for leave to inspect and this was granted. The claim of unlawful search and seizure was rejected. *American Tobacco Co.* v. *United States*, 147 F. 2d 93 at 116 (1944).

[12] *Bowman Dairy Co.* v. *United States*, 341 U. S. 214 (1951).

before the Court and jury and trial itself might be the first time that the existence of particular documents was made known to the other side.

Third, stipulations are important in civil cases. A stipulation is a stipulation no matter where it is found. It is certainly not unknown in criminal cases. Here we must say that there is no special advantage in a civil case unless it be perhaps that Civil Rule 16 explicitly gives to the Court at a pre-trial conference the power to consider "the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof." With this power in the background the Court may be able to exercise its persuasive powers over a reluctant stipulator with greater likelihood of success in a civil case than in a criminal case where there is no counterpart rule.

Fourth, the control of depositions, interrogatories and other pre-trial discovery matters. This may be a matter of the greatest importance in the Big Case but on the criminal side there are no counterparts of the civil deposition and discovery rules so there is no problem.[13] Depositions under the Criminal Rules are of little importance. They may be taken only under limited conditions and may be used at the trial only under carefully defined circumstances.[14]

On the civil side, however, the very use of the full paraphernalia of the civil deposition and discovery rules (Rules 26 through 37) may produce abuse and real hardship unless some supervision and control are maintained over this activity. It is because there has been abuse that all groups that have studied this problem have recommended that some control be exercised by the trial Court. In slightly different forms this recommendation is made by the Judicial Conference Committee,[15] by the American Bar Committee[16] and by the

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13 The extreme reluctance of the Court as to discovery in a criminal case is shown in the motion made and granted in a civil case to dismiss interrogatories propounded by a defendant on the ground that the answers, if given, would require the government to supply information that could not otherwise be obtained in a companion criminal case, *United States* v. *Linen Supply Institute*, D. C. S. D. N. Y. August 12, 1955, C. C. H. 1955 Trade Case ¶68,132.

14 Rule 15.

15 Report of the Judicial Conference on Procedure in Antitrust and Other Protracted Cases, dated September 26, 1951, p. 11, 13 F. R. D. 68.

16 Report of the Committee on Practice and Procedure in the Trial of Antitrust Cases, A. B. A., dated May 1, 1954, pp. 22-23.

Attorney General's Committee.[17] All recommend that discovery should not be permitted until the issues to be tried have been stated to the satisfaction of the Court and that then, and only then, should pre-trial depositions and discovery be permitted under the supervision of the Court itself.

In all of these recommendations there is recognition of the position taken by the Judicial Conference Committee that "The Rules of Civil Procedure relating to discovery . . . were not intended to make the courts as investigatory adjunct to the Department of Justice." [18] As it is put in the A. B. A. Report "Once the court permits the parties" in one of these cases "to stray into unbounded discovery on vague or undefined issues, the chance of ever achieving a trial of manageable proportions is lost." [19]

The preliminary draft of proposed amendments to the Rules of Civil Procedure as published by the Advisory Committee proposes the addition to Civil Rule 16, the pre-trial conference rule, of provisions for the assignment of the case to one judge not only for trial but for "the direction and control of all matters preliminary to trial, including permission for the taking of depositions or for discovery and the entry of orders for the protection of the parties on proceedings in discovery." The approval of this change will implement the recommendations described above. The vigorous exercise of the powers conferred will do much to improve the effective management of pre-trial and trial of these cases.

In totaling up the score as between the civil and the criminal side—and only the high spots have been touched—it becomes quite plain that the chief beneficiary of the trial on the criminal side is the Court itself. The laborious task of finding the facts need not be undertaken. On the criminal side, the jury takes care of that!

There is no need to elaborate the point that on the criminal side little can be done by the trial Court toward the attainment of the objective, so well stated by the Judicial Conference Report, of the avoidance of *unnecessary* volume of record, expense and delay.

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17 Report of the Attorney General's National Committee to study the Antitrust Laws, pp. 363-364.

18 Report of the Judicial Conference Committee, p. 9.

19 Report of the Committee on Practice & Procedure in the Trial of Antitrust Cases, A. B. A., dated May 1, 1954, p. 22.

Chief Justice Vanderbilt has warned us in an opinion in a murder case two years ago[20] that just because there is a trend toward liberal discovery in civil cases, it does not follow that there should be the same sort of liberality in criminal cases. He points out that "In criminal proceedings long experience has taught the Courts that often discovery will lead not to honest fact finding, but on the contrary to perjury and the suppression of evidence."[21] And he added that "The criminal defendant who is informed of the names of all of the State's witnesses may take steps to bribe or frighten them into giving perjured testimony or into absenting themselves so that they are unavailable to testify." And he concluded that the kind of discovery that has developed on the civil side "would defeat the very ends of justice" in criminal proceedings.[22]

Perhaps we are confronted with a hopeless situation but surely the following factors ought to be considered:

First, if the defendants are only corporations—as they often are—then the privilege against self-incrimination is not available and the privilege against unreasonable search and seizure is of limited application.[23]

The government through the grand jury therefore may enjoy the most sweeping investigatory powers and the defendant, apart from the limited countervailing discovery already described, has little that he can do to restore a balance. The result is that to restore a balance of discovery power and to bring about the situation that now exists on the civil side there might well be a more liberal discovery in criminal cases of this sort, even if amendments to the present rules may be required. If, however, an individual is named as a

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[20] *State* v. *Tune*, 13 N. J. 203, 98 A. 2d 881 (1953).

[21] *Ibid.*, at 884.

[22] *Ibid.*, at 884.

[23] *Johnson* v. *United States*, 228 U. S. 457 (1913), books held by bankruptcy trustee not subject to privilege against self-incrimination asserted by individual bankrupt; *Fuller* v. *United States*, 31 F. 2d 747, C. C. A. 2d (1929), corporate books and records even if in possession of individual defendant, same; *In re Subpoena Duces Tecum*, 81 F. Supp. 418, D. C. N. D. Cal. S. D. (1948), but individual members of partnership may assert privilege against unreasonable search and seizure; *United States* v *Lawn*, 115 F. Supp. 674, D. C. S. D. N. Y. (1953), indictment based on evidence produced before grand jury in violation of privilege will be dismissed; *United States* v. *Brasley*, 268 Fed. 59, D. C. W. D. Penn. (1920) privileges of Fourth and Fifth Amendments not operative as to corporate books and records.

defendant then the constitutional protections must be given full effect and far less can be done.

Second, if the criminal case is tried before a jury a very special emphasis is added to the points already made.

Third, the points made by Chief Justice Vanderbilt as to the real dangers of perjury, suppression and manufacture of evidence and disappearance of witnesses that might flow from any liberalization of discovery in a murder case or in a big mail fraud, income tax or conspiracy case or in criminal cases generally would not exist as a decisive factor in the big antitrust case with only corporate defendants unless it be in the racketeering type of case.

This may seem like using one set of rules for one criminal offense and another set for other offenses. It is just that but, it seems unobjectionable to fit the procedure to the type of case that is to be tried. We are coming to that on the civil side as the Judicial Conference Report in effect suggests. It makes a basic distinction between what that Report calls a protracted case and other cases.

The effort must be to implement, as far as we may, the objective set by the Judicial Conference Committee: the elimination of *unnecessary* volume of record, expense and delay in protracted proceedings wherever they may be found. Even if progress on the criminal side must be slight when compared with the great progress that has already been achieved in civil cases, we should do all we can when we can.

MY ANTITRUST PHILOSOPHY: EVIDENCE OF SCHIZOPHRENIA OR SHATTERING TRANSFORMATION?

by

ALFRED E. KAHN*

Having been out of the country for a year, I did not until very recently discover that the consistency of my position with respect to the antitrust laws was the subject of a brief but pointed analysis by Professor Morris A. Adelman, in the pages of the *Antitrust Bulletin*.[1] I would not have thought the subject of great public interest; but since it has been opened, may I be permitted a brief reply? I believe discussion of the particular question Professor Adelman raises *ad hominem* may shed some light on the more significant general issues as well.

Professor Adelman is concerned because he finds a basic divergence between the points of view of the February 1953 *Fortune* Supplement, "Big Business in a Competitive Society," which I wrote with A. D. H. Kaplan, and the Louis Schwartz dissent to the *Report of the Attorney General's National Committee,* to the privately circulated version of which my name is attached as having "expressed concurrence in the central thesis . . ." Are the differences between Kahn-writing-for-*Fortune* and Kahn-agreeing-with-Schwartz evidence of schizophrenia, or "a shattering transformation of . . . opinions," as Adelman puts it, or something else?

The general conclusion of the *Fortune* piece is explicitly stated:

> "The purpose of our appraisal has been to contribute to a balanced view of the role and net contribution of Big Business. There is no scientific, entirely objective way of reaching a verdict. The interpretation can only be intuitive in method and tentative in conclusion. With these qualifications this is the conclusion that emerges:
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> "In our economy Big Business undertakes the major role of coordinating individual efforts and resources into collective

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1 Adelman, M. A., *General Comment on the Schwartz Dissent*, 1 Antitrust Bull. 71 (April, 1955).

> achievement. This is a function that must be undertaken under modern technology, whether under private enterprise or by the state. Big Business represents an institutional compromise that is one of the most distinctive features of American society. . . . In America it has been possible so to mix dispersion with centralization that it has been possible to leave the major job to private competition, under government rule making. Big Business has not merely been kept effectively subject to this competitive control; on the whole it has also made an essential contribution to its scope, vitality, and effectiveness." [2]

My connection with the article is a complicated one. The editor's note introducing it explains that it is a "summary of the forthcoming Brookings study of Big Business and competition." I wrote this summary, with some advice from Dr. Kaplan. But the book and the central position it summarizes are his. Were I writing my own statement about "Big Business in a Competitive Society," I would obviously not have written this particular statement, with its particular emphasis. This does not mean I simply disavow responsibility for the substance of the *Fortune* article. On rereading it, after three years, I am immodestly impressed with the moderate and carefully qualified manner in which it states its impressions—that is, after all, what its non-statistical conclusions represent—and the persuasiveness of the general case it makes for business size and integration. But the general argument of the article, however carefully qualified, does not tell the entire story as I would tell it speaking for myself, if I were forced to generalize about business size, integration and fewness of sellers. For I do indeed confess to a partial split personality on the subject: on the one hand, to a certain Schwartzian uneasiness about these phenomena and a recognition and belief that such size and concentration as we have in the American economy today are neither the simple outcome of dynamic competition in the past nor essential to it in the future; on the other hand a Kaplanian recognition that oligopolistic competition may often be the most effective kind attainable. I am not lonely in my schizophrenia; I have much company among fellow economists.

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[2] Op. cit., *Fortune*, section 2, p. 14 (February, 1955).

But what does the *Fortune* article say that is directly relevant to antitrust policy? It says that the antitrust laws play an essential role in keeping the American economy as effectively competitive as it is. And, it clearly implies, the laws should not condemn business size, fewness of sellers, or integration *per se*. I have no difficulty in accepting these arguments: I wrote them.

The major conclusion of the Schwartz statement, as Adelman himself begins by pointing out, is more difficult to identify. Since it is a dissent, I took its central point to be its characterization of and general reaction to the Committee Report:

> "The central thread of the Majority Report unwinds from a core of belief that the competitive situation in this country is satisfactory, and that the antitrust laws require modification chiefly to temper their rigor."

Since I agreed with that characterization and with its implied opposite prescription, I formally responded to the Co-Chairmen of the Committee and to Professor Schwartz, as follows:

> "I concur with the substance of the dissent, though not with every criticism of the Majority Report or with some of its basic proposals.
>
> "Specifically, and principally, I concur:
>
> "a) In its view that the individual proposals of the Report add up, as a whole, to a substantial weakening of the antitrust laws. It is possible to find almost every section thereof reasonable and moderate, only to discover at the end that the whole leans—albeit only moderately and reasonably—heavily in one direction. With Professor Schwartz I disapprove of this inclination;
>
> "b) In its stress, instead, on the need for a positive and dynamic antitrust policy—for example, in testing and applying Section 7 of the Clayton Act. The Report needs a forthright statement of the ends to be served thereby, along the lines of Schwartz' pp. 2–top of p. 4;
>
> "c) In its specific proposals for condemnation of such decisions as *U. S. Steel*,[3] *Columbia Steel*,[4] *General Electric*[5] and

[3] *United States* v. *United States Steel Co.*, 251 U. S. 417 (1920).

[4] *United States* v. *Columbia Steel Co.*, 334 U. S. 495 (1948).

[5] *United States* v. *General Electric Co.*, 272 U. S. 476 (1926).

General Talking Pictures,[6] and of such decrees as *Timken*[7] and *National Lead*;[8]

"d) In its identification and approval of the emergent doctrine that certain practices (notably the insistence on exclusive dealing, mergers, and systematic price discrimination) are *per se* illegal when engaged in by dominant firms;

"e) In its entire discussions of Administration and Enforcement, and Exemptions from the Antitrust Laws."

But I did not concur in "some of its basic proposals." So, my letter continued:

"On the other hand, I do *not* agree that:

"a) Economic studies and analysis demonstrate such ineffectiveness of competition in the American economy today as to justify the application of the principles of the Public Utility Holding Company Act to industry generally. (Incidentally, the F. T. C. study referred to on p. 5 did not show that 'small and medium operations were generally the most efficient'—see, e.g., the article by John Blair in *Rev. Econ. & Stat.* around 1942, showing that the F. T. C. figures themselves demonstrate that the biggest firms were 'generally' more efficient than small and medium-sized ones.);

"b) Industry-wide patent pools should be flatly prohibited, and competition-by-litigation required;

"c) *Limited, potential* foreclosure suffice to condemn exclusive dealing agreements under Sect. 3 of the Clayton Act; or that

"d) Mere price differences suffice, as in the *Moss* decision, to establish a *prima facie* violation of the Robinson-Patman Act.[9]

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[6] *General Talking Pictures Corp.* v. *American Telephone & Telegraph Co.*, 18 F. Supp. 650 (D. Del. 1937).

[7] *United States* v. *Timken Roller Bearing Company*, 83 F. Supp. 284 (N. D. Ohio, 1949), aff'd 341 U. S. 593 (1951).

[8] *United States* v. *National Lead Co.*, 332 U. S. 319 (1947).

[9] *Samuel H. Moss, Inc.* v. *Federal Trade Commission*, 148 F. 2d 378 (2d Cir. 1945).

> "In short, I concur in Professor Schwartz' dissent generally, because it disapproves the broad tendency of the Majority Report to resist and to reverse the developments of recent years that have tended to restore to the traditional antitrust laws their intended scope and vigor. I disagree with it in so far as it proposes to introduce new, economic tests of monopoly whose application would require radical amendments of the law and evidences of anti-competitive impact in Clayton Act cases that few economists would accept."

I see no point in re-traversing all the ground covered in the dissent or in Adelman's critique thereof, to support our characterization of the Report, and of the general impression it leaves with the reader. As I wrote the Co-Chairmen, in introducing the foregoing comments:

> "It must be disconcerting to you, after having attempted to prepare a report capable of commanding broad support, to be faced now with a kind of shot-gun criticism. But I think this final drawing apart is inevitable. Specific comments and criticisms inserted throughout the Report can not adequately express dissenting viewpoints. If the Report is to have either vitality or integrity it must be more than the sum of its parts; it must embody a basic point of view about where we stand and in which direction we ought to go. I do not agree fully with Schwartz' characterization of this rationale implicit in the Majority Report, or with his own alternative. But I think he has performed a genuine service in attempting to supply explicit, coherent expressions of a basic point of view."

The complex character of any single person's reactions to the Report, and to the Schwartz statement, could not possibly have been conveyed in a brief comment. But neither in a Report by 61 people, nor in a general dissent was it possible to have each individual point of view thoroughly stated. Accordingly, I expressed no objection to the Committee's general procedure of treating dissents[10] and do not now

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[10] See my letter to Everett MacIntyre, reproduced in House Committee on the Judiciary, Antitrust Subcommittee, 84th Cong., 1st Sess., *Current Antitrust Problems*, Part III, 1955, p. 1917.

object to Schwartz' manner of appending my name to his statement.[11] But I do not protest that it is a little far-fetched, to put it mildly, to berate me for inconsistencies between my summary of a book by A. D. H. Kaplan and a dissent by Louis Schwartz. Adelman could not have been expected to realize in how carefully qualified a fashion I subscribed to the latter, although he might have guessed it from some of my writings on the subject. But he could in any event have easily found out by asking me. Since the subject seemed to him important enough to discuss with your readers, perhaps that much additional research would have been justified.

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11 As I wrote the Co-Chairman: "If each Committee member is now moved to supply detailed criticisms and commentaries on the Schwartz dissent, we shall have another Committee Report appended to the first one. Because there remains here a serious problem of organization, and because I do not know how you plan to resolve it . . . I must leave to you (perhaps in consultation with Prof. Schwartz) the decision as to how precisely you will record or summarize my reaction, which I herewith transmit . . ."

BUSINESS METHODS AND ANTITRUST POLICY: THE AUTOMATIC CANTEEN CASE

by

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Government regulation of industrial behavior raises some of the most profound and perplexing problems of our times. General questions regarding industrial regulations exist on a number of levels. How far should government regulations go? When should we rely on such indirect measures as financial and monetary controls? When should we employ such direct regulation as price and wage control? How much attention should government give to setting the rules of fair competition between private individuals in order to increase the efficiency of commerce generally? At the one extreme, should we enforce atomistic competition; at the other, encourage all-out competition which might produce more industrial giants?

Running through the fabric of these problems in the United States are the threads of another and more technical set of issues, dealing with the nature of the regulatory process itself. How general, how detailed, should regulatory legislation be? How far should we depend on court interpretation to apply general rules which are set up by Congress? Is a general-principles regulation, such as the Sherman Act preferable? Or should we lean toward such narrow-rule regulation as the Clayton Act? How much reliance should we place on the administrative agencies in their manifold functions—legislative, judicial and prosecuting?

We have been so preoccupied with these general issues that we have not devoted adequate attention to the legislative process itself. Legislatures, both state and federal, have no convenient guides for determining when a regulation is so novel or significant that it requires more careful attention and deliberation. Substantial regulations, creating entirely new legal concepts, may be rushed through while the codification of a well-established field is given most careful deliberation.

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Compare, by way of example, the enactments of the Uniform Commercial Code[1] and the Robinson-Patman Act.[2]

Basic provisions of the Uniform Commercial Code had been worked out over many generations. The draftsmen had a body of court decisions as well as extensive legislative enactment and a substantial literature covering the field. The changes were evolutionary, not departures in fundamentals. Nevertheless, the deliberations have been imposing. Consider, for example, the discussions under the auspices of The American Law Institute and the National Conference of Commissioners on the Uniform State Laws, together with the debates in legislatures, in legal publications and in business journals.

In contrast, consider the enactment of provisions of the Robinson-Patman Act which may have an even greater impact on many businesses than the Uniform Commercial Code. Here, in one stroke, Congress enacted a price regulation which employed entirely novel legal concepts: using cost differences to determine the legality of price differences; and possibly placing upon the buyer a completely different type of responsibility—to make sure that under certain circumstances he pays a price which is high enough to satisfy the requirements of the Act. The novelty of the regulation was additionally compounded by the fact that a key principle is not founded on current commercial usage. For, the Act depends strongly on measurements of cost differences, though there are no generally acceptd principles for analyzing such cost differences in current use.[3] Indeed,

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[1] The American Law Institute and National Conference of Commissioners on Uniform State Laws, Uniform Commercial Code, Official Draft (1952).

[2] 49 Stat. 1526 (1936), 15 U. S. C. §§13, 13a, 13b, 21a (1952).

[3] The authors feel that the cost features of the Act do not provide practicable principles for regulation because most companies have neither the information nor the skills necessary to develop reasonable estimates of these cost differences. Although such estimates *can* be made, the essential point is that few have shown a capacity to make them.

Methods are available for estimating differences in the costs of selling to several types of customers. Such estimates have been made occasionally both before and after the passage of the Robinson-Patman Act. However, estimates of this type have depended on accounting theories and methods that are specially devised for the specific problem. Therefore, there are no recognized or standard methods for making such estimates or for testing their reasonableness.

We have had some experience in making estimates of cost differences in selling to various classes of customers. We feel that it is possible to develop such estimates and to prove their reasonableness. However, industry experience since the passage of the

cost accounting conventionally measures *average* costs, not cost differences. Thus, without serious deliberation, Congress passed a radical innovation which is all-pervasive—influencing price policies, price movements and price actions throughout industry.

Similarly, we have devoted inadequate attention to the functions of the courts, the administrative agencies and the bar in clarifying and developing new regulatory theories cast up by our legislatures. Should the courts take the initiative in laying down guideposts for interpreting a new regulation? Should the courts confine themselves to the issues which are laid down by the pleadings? Or, when a substantial issue of public policy is involved, should judges try to determine the issues on grounds which they deem appropriate, even if the grounds were not employed by the litigants?

These issues have taken on increased importance in the operation of administrative agencies in the light of their legislative-judicial ambivalence. What responsibilities rest on an administrative agency for clarifying legislative mandates; for extending the force of legislative enactment; for testing out new regulations as contrasted with preparing to *win* cases in the courts? Should it merely carry out the letter of a specific Act in its rule-making; should it assume responsibility for resolving all of the conflicting interests in the subject of regulation; or should it try to rationalize the policy of the one Act with general policies reflected in other legislation and in judicial decisions?

These issues have not been recognized appropriately in considering the functions of the bar. In our analysis of the law-making process we have only dimly referred to the role of the practicing lawyer in the development of the law. Yet, how can we achieve clarification in regulation; how can we ensure adequate consideration of the complex factors of current industrial processes without the active

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Act shows that very few satisfactory estimates of this type have been established. That has been recognized by the present Chairman of the Commission:

> "Although savings in cost constitute the primary justification for lawful price differentials under the Act, there has been little advancement in the field of distribution cost accounting during the 17 years it has been on the books. Business concerns have found it very difficult, if not impossible, to determine precisely what cost savings are allowable and how they may be proved. The few distribution cost studies that have been developed have been very expensive and have involved detailed functional analyses of the seller's entire business." Edward F. Howrey, Small Business and the Federal Trade Commission, address before the Convention of the National Association of Retail Druggists, October 14, 1953.

participation of the bar—especially the lawyers for industry? Are we justified, for example, in placing sole reliance on the Federal Trade Commission in laying down the accounting ground-rules of the Robinson-Patman Act? Or, do we need also the probing, testing and needling of the lawyers for respondents to force a clarification which is based upon practicable methods of cost analysis?

These issues have taken on new importance in recent generations. Our industrial and commercial processes have become increasingly difficult to comprehend. At the same time, because of the profuse complexity of a modern economy—with extensive specialization in production and highly-developed interdependence among people, industries and regions—the efficiency and effiectiveness of these industrial and commercial processes have a profound influence on our economic and social well-being. Therefore, business regulation has become more significant, both in its scope and in its influence on day-to-day living.

Concurrently, the rise of administrative agencies has created both an advantage and a disadvantage. The advantage lies in the greater expertness in applying and developing legislative mandates. The disadvantage lies in the unfortunate influence of poorly-conceived legislation through continued implementation by an administrative agency. In contrast general statutes that have become obsolete or were legislative mistakes have been cured frequently by disuse and atrophy. Witness the myriad archaic laws on the statute books which have been effectively repealed only through historical attrition.

One of the forceful examples of the need for critical attention to the requirements of the regulatory process is the Robinson-Patman Act, passed in 1936.[4] This one piece of legislation has contributed several illustrations of the multiple deficiencies of a hurried patchwork of legislation, uninspired administration, submissiveness of respondents and confusion in the courts.

Two Robinson-Patman proceedings, *Standard Oil of Indiana*[5]

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[4] 49 Stat. 1526 (1936), 15 U. S. C. §§13, 13a, 13b, 21a (1952).

[5] Standard Oil Co., F. T. C. Dkt. 4389, complaint issued November 29, 1940, 41 F. T. C. 263 (1945) (order to cease and desist), 43 F. T. C. 56 (1946) (order modified), *modified and enforced*, 173 F. 2d 210 (7th Cir. 1949), *rev'd*, 340 U. S. 231 (1951), CCH Trade Reg. L. Rep. ¶14,925.40 (F. T. C. 1952) (modified order on original record), CCH Trade Reg. L. Rep. ¶11,306 (F. T. C. 1953) (order modified), CCH Trade Reg. L. Rep. ¶11,371 (F. T. C. 1953) (supplemental record certified to Court of Appeals for review), *vacated*, CCH Trade Reg. L. Rep. ¶67,727 (7th Cir. 1954),

and *Automatic Canteen*,[6] particularly demonstrate the waste of time, effort and attention that may generate by poorly-conceived legislation. The fumbling draftsmanship of the sections involved in these proceedings merely reflected the inadequate consideration given to the underlying economic problems during a hasty Congressional procedure. Added to that were the mechanical interpretations of the FTC which overlooked practicability and the relation to general anti-trust policy.

Section 2(b)[7] of the Act could be read that a seller who cut his own price to meet the price of a competitor: (1) established a complete substantive defense against charges of discrimination, or (2) merely launched a procedural counterattack which could be defeated by proof that his low price did in fact substantially lessen competition. This ambiguity was the issue in *Standard Oil*. The statute could readily be interpreted either way, and the Congressional history gave no conclusive indication of intent.[8]

The FTC adopted the procedural interpretation. A purely mechanical reading of the words leans more toward such interpretation. Further, such a reading would have strengthened the FTC's hand in enforcement and litigation.

The Supreme Court rejected the FTC position. In resolving the doubt, it looked to the broader objectives of anti-trust policy and concluded "that Congress did not seek by the Robinson-Patman Act either to abolish competition or so radically to curtail it that a seller would have no susbtantial right of self-defense against a price raid by a competitor."[9] This conclusion was based on the observation

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CCH Trs. L. Rep. ¶25,303 (F. T. C. 1955) (reconsideration refused), *appeal pending* (7th Cir.).

[6] *Automatic Canteen Co. of America*, 46 F. T. C. 861 (1950), (F. T. C. Dkt. 4933), aff'd, 194 F. 2d 433 (7th Cir. 1952), rev'd, 346 U. S. 61 (1953).

[7] For text, see note 16, *infra*.

[8] The Judiciary Committee of the House of Representatives reported that the proviso "permits discriminations without limit where made in good faith to meet competition." H. R. Rep. No. 2287, 74th Cong., 2d Sess., 16 (1936). Accord, 80 Cong. Rec. 6435 (1936) (Senator Moore offering the addition of this Section). On the other hand, the Chairman of the House managers explained that the proviso "does not set up the meeting of competition as an absolute bar to a charge of discrimination under the bill." 80 Cong. Rec. 9418 (1936).

[9] 340 U. S. at 249.

that, "The heart of our national economic policy long has been faith in the value of competition." [10]

The issue decided in *Standard Oil* is fundamental to any real understanding of the nature of meeting competition. To that extent the "seasoning" of Robinson-Patman as a guide to business conduct was retarded for more than fourteen years. Congress could have settled this important point at the outset. Instead the FTC, the courts and the bar had to wait for a long drawn-out proceeding, and business could obtain only conflicting and uncertain legal advice.

A more recent illustration and, possibly, a more discouraging one is the recent *Automatic Canteen*[11] case which we are reviewing here. The problem of that case: Did Congress intend to compel a buyer, who is attacked under the Act, to prove affirmatively that his sellers enjoyed specific cost savings in dealing with him? The issue is so important that it should have been obvious. In a well-ordered legislative process, it would have been carefully considered and resolved. However, because of the peculiar structure of the Act and its legislative history, Congress appears not to have considered the question much less answered it.

Against that background, the Federal Trade Commission did not exert itself to settle or even to clarify these issues. It proceeded vigorously to test and develop other sections of the Act. However, it apparently neglected to explore the policy implications of Section 2(f) on its own.

On the other hand, the few respondents who were attacked under Section 2(f) did not see fit to challenge the Commission's interpretation until Automatic Canteen picked up the cudgels.

In the judicial proceedings, the differences between the Commission's interpretations of the Act and those advanced by Canteen narrowed down to this one issue. A clear-cut judicial decision on that one issue would have resolved this basic question and cleared the road for proceeding to further problems. However, the judicial opinion did not provide the clarity which was, and is, so necessary.

Our thesis is this: In establishing a number of principles in the *Canteen* proceeding, the Supreme Court was handicapped by a serious deficiency of groundwork in exploring what should govern a

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10 340 U. S. at 248.

11 346 U. S. 61 (1953).

buyer's responsibility. The deficiency is attributable cumulatively to the Congress; to the FTC, in both its policy, functions and in the theory of its proceedings; to the respondents; and to the courts.

The Commission proceedings did not provide the Supreme Court with adequate guideposts through an unexplored area. Such guideposts should have provided a basic understanding of how industrial costs behave, the operation of cost accounting systems, the types of cost information which are readily available in the market place, and the types of information which arm's length buyers have, or should have, in a competitive market. Without these guideposts it is impossible to set a competitive course in steering the application of Section 2(f).

Mr. Justice Frankfurter attempted earnestly to fill the void and settle the interpretation on a broad scale. He tried to set up rules which would serve as practical guides to the operation of Section 2(f). However, as we see it, his rules are inconsistent within themselves. Indeed, by trying to cover more than the single holding required by the issue, he enmeshed even that issue in the inconsistencies.

Because of these inconsistencies we feel the FTC should now reexamine the problem thoroughly.[11a] The record in *Canteen* certainly would not have furnished the clean slate that is needed. Hence, its recent dismissal of that proceeding appears sound.[12] The opinion of dismissal itself does nothing to settle the questions. Its examination should produce a clear-cut set of practical guides for the Commission's further deliberations. For, it is only through such a program that the Commission can do its share in providing the guidance that everyone concerned—The Congress, the courts, the bar and industry generally—needs to create practicable policies in a most important area of public policy.

[11a] The uncritical acceptance of the Supreme Court's *Canteen* decision by the Attorney General's National Committee to Study the Antitrust Laws serves as neither a substitute nor even a starting point for such a re-examination. Report of the Attorney General's National Committee * * * 193-7 (1955).

[12] CCH Trs. Reg. L. Rep. ¶25,312 (F. T. C. 1955).

Broad Issues of the Case

Automatic Canteen Co. of America v. *FTC*,[13] decided by the Supreme Court nearly seventeen years after enactment of the Robinson-Patman Act, was the first case against a buyer under Section 2(f) to reach the courts. In a number of its proceedings the FTC had imposed upon buyers the same burden of cost-justifying price differences which it requires of sellers.[14] It tried, and failed, to get the Court to approve this rule. The strategic extension of interpretation attempted by the Commission would have had an important impact on critical phases of competition in the marketing process.[15]

The outlines of the case were as follows:

1. The core of the Robinson-Patman regulation[16] is focused on seller's activities. The Act forbids the sale of a product to customers

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13 346 U. S. 61 (1953), *rev'g* 194 F. 2d 433 (7th Cir. 1952).

14 *F. T. C.* v. *Morton Salt Co.*, 334 U. S. 37, 44-5 (1948) (burden of justification on seller).

15 The force and intent of the F. T. C. attempt has been characterized by some commentators so strongly that they would have had it appear as if the Commission were trying to eliminate the full effect of price bargaining in the market. E.g. Austern, Caveat Emptor — Let the Buyer Beware, Address before the National Association of Purchasing Agents, reprinted in Chicago Purchaser, July 1952.

16 Section 2(a) That it shall be unlawful for any person engaged in commerce, or in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided,* That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided, however,* That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: *And provided further,* That nothing herein

at different prices if the effect might injure or lessen competition. However, a seller may justify a price difference which injures or lessens competition if he can prove equivalent differences in his costs (Sections 2(a) and (b)) or if he can show that he reduced the price in order to meet an equally low price of a competitor (Section 2(b)).

2. Since sellers know much more about their own costs than the FTC does, Section 2(b) provides that if it is proved that there has been a discrimination, the burden of showing that the discrimination is justified "shall be upon the *person* charged with a violation of this section . . ." [emphasis added].

3. Section 2(f) of the Act forbids buyers knowingly to induce or receive price discriminations prohibited by the Act.[17]

4. In the *Canteen* proceeding, the Commission said that a buyer who knowingly pays lower prices than others has violated the Act unless he can show that his seller's cost-savings in dealing with him justified the lower prices.[18] This contention is based on the premise that the Commission has proved a violation of the Act when it shows that the buyer knowingly bought at lower prices; that the buyer is a *person*

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contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: *And provided further,* That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

Section 2(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

17 Section 2(f) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section. 49 Stat. 1526 (1936), 15 U. S. C. §13 (1952).

18 *Automatic Canteen Co. of America,* 46 F. T. C. 861, 896-7 (1950).

charged with violation of the Act; and that under a literal interpretation of 2(b) he must prove that the difference is justified.

5. Canteen argued that the FTC must show a "prohibited discrimination," an *unjustified* difference in prices charged by the seller, which was known to the buyer; accordingly, in proceeding against a buyer, the FTC must show affirmatively that the seller's costs did not justify the price difference and that the buyer had knowledge of this lack of justification.

6. The Supreme Court upheld Canteen. However, Mr. Justice Frankfurter dispensed dicta on the subject of "knowledge" which creates a new range of problems and casts doubt on the character of the holding.

In the broad sense, the administrative and judicial problem raised by the *Canteen* case was to announce a principle which carries out national economic policy in favor of competition, or at least does not interfere with it.[19] In doing so, the courts must give due recognition to the Congressional mandate in the Robinson-Patman Act as they understand it; they must try to delineate the harmony of purpose between Robinson-Patman and the other anti-trust statutes; if they find disharmony, they must reconcile or determine which philosophy is to prevail. By placing a heavy burden on buyers, would the court discourage aggressive price bargaining? Would such a move weaken

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[19] The present chairman of the Federal Trade Commission, Edward F. Howrey, has on several occasions emphasized the unity which should exist in anti-trust policy and among the statutes through which it has been expressed:

"We are committed to vigorous administration and enforcement of all the laws within our jurisdiction, including the Robinson-Patman Act. But it is important that the Sherman Act, the Federal Trade Commission Act and the Clayton Act, with its Robinson-Patman amendment, be administered as inter-related expressions of the national antitrust policy—not as separate and conflicting statutes." Summary of address before the Drug, Chemical and Allied Trades Section, New York Board of Trade, June 17, 1954.

"There may be some inconsistency between them—the 'hard' v. 'soft' competition concept, for example—but these inconsistencies have been magnified out of all proportion. The gearing of the privilege to compete (Sherman Act and F. T. C. Act) with the obligation to compete fairly (anti-price-discrimination act), is not necessarily inconsistent except as made so by strained and unrealistic statutory interpretation." Summary of address before the National Retail Dry Goods Association, January 14, 1954; also, Revaluation of Commission's Responsibilities, in Federal Antitrust Laws, U. of Mich. L. School (202, 203 (1954)); Edward F. Howrey, The Federal Trade Commission and Business, 7 A. T. A. E. J. 25 (1955).

market competition which is the ultimate objective of anti-trust policy? If that is so, is Robinson-Patman properly read as changing that ultimate objective? If the Act is not to be so read, what interpretation preserves maximum competitive freedom for the individual yet gives meaning to Section 2(f)? For example, how can the competitive freedom of the individual be limited when it threatens the competitive freedom of the community without, at the same time, indirectly limiting competition in the community?

The argument in favor of strict restrictions on buyers is that price discriminations enable some buyers to exploit substantial economic power; this power is used to cut prices and force small competitors out of the market; this process will increase monopolistic forces in the long run.[20] In the main, pressure for price differentials is generated by buyers and the primary victims are sellers. A strong buyer can work one seller against another and extract increasingly favorable concessions. To preserve competition, the main enforcement should be directed against the buyer as the source of the problem, rather than against the seller who is, himself, a victim of the buyer's pressure.

An opposing argument is that the Sherman Act can be used to deal effectively with buyers who carry their pressure to such an extreme that they create monopolistic tendencies.[21] In such situations the

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20 This was the dominant theme of the A&P litigation under the Sherman Act; *United States* v. *New York Great Atlantic & Pacific Tea Co.*, 67 F. Supp. 626 (E. D. Ill. 1946) *aff'd*, 173 F. 2d 79 (7th Cir. 1949) (criminal), and *United States* v. *The New York Great Atlantic & Pacific Tea Co., Inc.*, CCH Trade Reg. L. Rep. ¶67,658 (S. D. N. Y. 1954) (civil, consent decree); see also *Great Atlantic & Pacific Tea Co.* v. *F. T. C.*, 106 F. 2d 667 (3d Cir. 1939), *cert. denied*, 308 U. S. 625 (1940) (brokerage allowance violating Section 2(c) of Robinson-Patman Act).

21 While the rationale of the A&P decision has produced great controversy, the opinion does suggest that the serious charges of abusive power by mass buyers which motivated the passage of the Robinson-Patman Act can be dealt with effectively under the Sherman Act.

> "Sometimes I doubt whether we ever needed the Robinson-Patman law, with all its elusive uncertainty. I have thought that the Sherman Act, properly interpreted and administered, would have remedied all the ills meant to be cured." Lindley, P.J., 67 F. Supp. at 676.

The substance of "unfair methods of competition" in section 5 of the Federal Trade Commission Act, 38 Stat. 719 (1914), 15 U. S. C. §45 (1952) has been construed as including much the same content as sections 1 and 2 of the Sherman Act. In proceedings prior to Robinson-Patman, the F. T. C. dealt successfully with loose combina-

buyer's position approaches monopoly power in some respect. But, indiscriminate prohibitions against buyers efforts to reduce prices is likely to have side effects which weaken competition—among buyers and sellers alike. Sellers must be induced to compete by bargaining; they are not very likely to compete very aggressively if buyers are not diligent in the bargaining process. If buyers must act at their peril in price bargaining, sellers will have less incentive to keep prices down. Thus, while the express intent of the Act is to prevent monopolistic tendencies if it is interpreted strictly against buyers, its main effect would be to weaken competition.

In the conflict of these and intermediate points of view, the issue considered here is not whether Section 2(f) should be repealed, but how it should be interpreted. At one extreme, we would follow a new doctrine of *caveat emptor* and make a purchaser buy at his peril in accepting a lower price; at the other extreme, we might relieve him in all cases except when there is enough coercion to proceed under the Sherman Act.

Against this background, interpretation of the word "knowingly" in Section 2(f) is especially sensitive. If "knowingly" does not charge an ordinary buyer with more information than he would ordinarily have, competitive market conditions will not be significantly impaired. If "knowingly" charges him with knowledge which he cannot readily obtain, the resulting legal responsibility may compel buyers to change their methods radically. The competitive implications of such a change in market conditions may be far-reaching.

Background of the Canteen Case

Analysis of the *Canteen* case requires an understanding of its setting. The broad significance of the case cannot be found within the

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tions of distributors exacting from manufacturers agreements to supply them at more favorable prices or other terms than direct buyers or to refuse to deal with direct buyers at all. E.g., *Western Sugar Refinery Co.* v. *F. T. C.*, 275 Fed. 725 (9th Cir. 1921), in which a manufacturer yielded to demands of jobbers not to deal with retailer owned jobber competitors except on less favorable price terms; *Arkansas Wholesale Grocers' Ass'n* v. *F. T. C.*, 18 F. 2d 866 (8th Cir. 1927), *cert. denied*, 275 U. S. 533 (1927), in which wholesale grocers pressured manufacturers not to sell direct at prices less than the wholesalers' retail customer prices. It should also be possible for the F. T. C. under §5 to reach equivalent activities of close combinations like A&P which fall within the Sherman Act. *Distillers Corporation-Seagrams, Ltd.*, F. T. C. Dkt. 6047, and *Schenley Industries, Inc.*, F. T. C. Dkt. 6048, CCH Trs. Reg. L. Rep. ¶11,660 (1954) (consent orders, conspiracies of affiliates under Section 5).

four corners of the Court's opinion. The case occupies a strategic position in the development of national policy concerning the entire concept of competition. This position involves three general developments which led to the *Canteen* proceeding.

The general setting of the Robinson-Patman Act, itself, contributes to an understanding of the case. This setting shows the general antitrust objectives of the Act, together with the reasons why the Act, which regulates sellers primarily, contains a provision applying directly to buyers.

The more specific setting of the *Canteen* case consists of two lines of activity within the FTC. One is the development of Section 2(f) in prior Commission proceedings. What law was generated before the *Canteen* proceeding? The other is position of the *Canteen* proceeding in the Commission's campaign in the candy industry to promote competition in the market for raw materials, in the manufacturers' sales of candy and in the wholesale and retail distribution of candy.

(1) *Mass purchasers and instigation of Robinson-Patman.*

The original Section 2 of the Clayton Act,[22] passed in 1914, was a loosely drawn provision to prevent predatory price cutting which weakens or destroys a seller's competitors,[23] dramatically illustrated in the then-recent *Standard Oil* and *American Tobacco* cases.[24] The section apparently was not intended to limit multiple price structures or to regulate competitive selling at differential prices. This is shown by the three unqualified exemptions allowed in the Act. Price differences were permitted in the presence of: (1) quality or quantity differences;[25] or (2) cost differences; or (3) the meeting of competition. The original Act was completely unconcerned with buyers.

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22 38 Stat. 730 (1914).

23 See remarks on history in *Goodyear Tire & Rubber Co.* v. *F. T. C.*, 101 F. 2d 620, 623 (6th Cir. 1939), *cert. denied*, 308 U. S. 557 (1939); Austin, Price Discrimination and Related Problems under the Robinson-Patman Act, 6-7 (rev. ed. 1954).

24 *Standard Oil Co.* v. *United States*, 221 U. S. 1 (1911), *aff'g* 173 Fed. 177, 190 (E. D. Mo. 1909); *United States* v. *American Tobacco Co.*, 221 U. S. 106, 182 (1911).

25 Even though they exceeded cost savings, such as those attributable to greater volume, and perhaps even in the absence of such savings; *Goodyear Tire & Rubber Co.* v. *F. T. C.*, 101 F. 2d 620 (6th Cir. 1939), *cert. denied*, 308 U. S. 557 (1939).

The rapid expansion of chain stores in the twenties excited Congressional attention. It was claimed that the new chains displaced large numbers of small retailers and threatened the existence of wholesalers since chains bought directly from manufacturers. In 1931 Congress directed the Federal Trade Commission to investigate chain store distribution for monopolistic tendencies and unfair competition.[26] The FTC investigation produced a series of reports culminating in a Final Report on the Chain Store Investigation.[27]

The role of the chain store as buyer received prominence in the final report. For example:

> "Lower selling prices are a very substantial, if not the chief, factor in the growth of chain store merchandising, and . . . lower buying prices than are available to independents are a most substantial, if not the chief, factor in these lower selling prices. These lower buying prices frequently take the form of special concessions. Many times the result is to give the chain lower prices than the wholesaler." [28]

The Commission felt that because of their enormous buying power the chains could bring great pressure upon manufacturers by threats to manufacture directly or to buy elsewhere. The large buyers obtained many special discounts and allowances which were not allowed to their small competitors.[29]

The FTC believed that Section 2 of the Clayton Act permitted quantity discounts which were unrelated to cost savings; therefore, any price reduction could be justified if a buyer took larger quantities; which meant that the chain stores would enjoy a continuing buying advantage over independents.[30]

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[26] Sen. Res. No. 224, 70th Cong., 1st Sess. (1931).

[27] Sen. Doc. No. 4, 74th Cong., 1st Sess. (1934).

[28] *Id.* at 53. The report, at pages 50-51, alluded to different selling prices in different units of a chain, but cautiously, because of the broad area of justification then existing in §2.

[29] E.g. advertising, delivery, service and promotional allowances, brokerage, quantity and trade discounts.

[30] *Id.* at 63-65. During this period the FTC decided to bring a test proceeding to make cost differences a limiting factor on price differentials based on quantity or quality. It made a finding that a price differential bore no reasonable relation to cost

The conclusions of the FTC added impetus to a decision to revise Section 2 of the Clayton Act in order to remove the loopholes which helped the chain stores.

Although considerable legislative attention was devoted to the ills which were to be cured, Congress spent little time on the cure itself. Indeed, the shift from a preoccupation with buyers in the diagnosis to a focus on sellers in the prognosis was never questioned or explained.[31]

Congressional attention was focussed on the FTC inquiry which complained about the strategic influences which the chain stores, as buyers, exerted on food manufacturers. In those discussions, there was no accusation against the manufacturers. Rather, it was implied that the producers were victims of the chain store pressures.

Starting with a desire to counteract the pressures of chains, the draftsmen of the Robinson-Patman Act wrote a regulation which was aimed primarily at manufacturers in their role as sellers. Obviously, the restrictions on sellers were intended to curb the buying advantages of chain stores and other large buyers. However, the primary barb of the regulation was aimed at sellers with little consideration of the desirability of regulating buying power so indirectly.

The specific circumstances in the enactment of the Act are significant in trying to relate Section 2(f) to the other sections. Nothing similar to Section 2(f) appeared in the committee drafts of either the House or Senate Bills.[32] The initial appearance of the Section was in its adoption by the Senate as a floor amendment without debate.[33] Its first and only consideration by the House was when it

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differences, and issued an order, but its new interpretation of the section was reversed after enactment of Robinson-Patman. *Goodyear Tire & Rubber Co.*, F. T. C. Dkt. 2116 (complaint issued September 13, 1933), 22 F. T. C. 232 (1936), *order set aside*, 92 F. 2d 677 (6th Cir. 1937) (moot because of Robinson-Patman), *rev'd*, 304 U. S. 257 (1938) (not moot), *order set aside*, 101 F. 2d 620 (6th Cir. 1939) (on merits), *cert. denied*, 308 U. S. 557 (1939).

[31] Austern, Dealing with Uncertainties, CCH Antitrust Law Sym. 343, 363 (1954) (the complexity of "government by indirection").

[32] H. R. Rep. 2287 and S. Rep. 1502, 74th Cong., 2d Sess. (1936).

[33] 80 Cong. Rec. 6428 (1936). It was proposed by Senator Copeland of New York. The sole statement was the following comment of acceptance by the sponsor:

"MR. ROBINSON. This amendment makes the person who knowingly receives an unfair, discriminatory price also liable; and I think it is sound in principle." *Id.*

was accepted by the House managers in conference,[34] and it was approved by the House after comment[35] but without debate.[36]

Canteen based part of its argument on the timing of the Senate's action on §2(f). The present §2(b), setting forth rules of burden of proof of justification and meeting of competition, originated in the House bill and was not in the bill submitted for Senate debate. *Id.* at 6279-80. Later in the day on which the above amendment was adopted, the §2(b) provision was adopted, also without debate, upon its introduction by Senator Moore of New Jersey as a floor amendment to protect sellers of milk and dairy products. *Id.* at 6435. Canteen relied on this sequence, coupled with phraseology in §2(b) which is unadapted to buyers, to urge that §2(b) has no application to §2(f). Canteen's brief in the Supreme Court, 31-34.

[34] H. R. Rep. No. 2951, 74th Cong., 2d Sess. (1936). The conferees eliminated reference to discrimination "in terms of sale" from both §2(f) and §2(a) to make the statute applicable only to *price* discriminations, direct or indirect. 80 Cong. Rec. 9414 (1936).

The conference report explained the addition in §2(a) of the word "knowingly" to that part of the "effect on competition" clause describing a person who "receives the benefit of such discrimination."

> "Its purpose is to exempt from the meaning of the surrounding clause those who incidentally receive discriminatory prices in the routine course of business without special solicitation, negotiation or other arrangement for them on the part of the buyer or seller and who are therefore not justly chargeable with knowledge that they are receiving the benefit of such discrimination." *Id.*

The significance of "knowingly" in §2(a) and of the above explanation is obscure. So long as "knowingly" is in §2(f), a buyer's position would not be affected by the deletion of "knowingly" from §2(a). Therefore the relation of "knowingly" in §2(a) to buyers is uncertain at best, although the F. T. C. claimed support for its §2(f) theory in the above quotation. Regardless of that, factual illustrations of the explanation are hard to picture in regard to buyers and §2(f). It may have slight defensive usefulness to a seller, although it is quite unclear why knowledge of the buyer is material to violation by the seller. See Austin, Price Discrimination and Related Problems under the Robinson-Patman Act, 43-4 (rev. ed. 1954).

[35] By House Manager Utterback in his summary of the reported bill. It is much quoted, doubtless for lack of anything else in the history of §2(f) to quote:

> "[Section 2(f)] makes equally liable the person who knowingly induces or receives a discrimination in price prohibited by the Amendment. This affords a valuable support to the manufacturer in his efforts to abide by the intent and purpose of the bill. It makes it easier for him to resist the demand for sacrificial price cuts coming from mass buyer customers, since it enables him to charge them with knowledge of the illegality of the discount, and equal liability for it, by informing them that it is in excess of any differential which his difference in cost would justify as compared with his other customers." 80 Cong. Rec. 9419 (1936).

[36] 80 Cong. Rec. 9413-22 (1936). The Senate made no further reference to it in approving the conference report. *Id.* at 9902-04; S. Doc. 207, 79th Cong., 2d Sess. (1936).

We have, then, a legislative history which sheds light on the confusion, but not on the intentions, behind the Act. Section 2(f) refers to a person who knowingly induces or receives "a discrimination in price which is prohibited by this section." Not any discrimination, but a *prohibited* discrimination. Sections 2(a) and (b) do not define a discrimination, let alone a *prohibited* discrimination.

The key question remains: Did Congress intend the phrase "a discrimination in price prohibited by this section" to mean a price difference which: (1) has one attribute—that it may substantially lessen competition; or, (2) has two attributes in that it may lessen competition and it cannot be justified by differences in cost or meeting a competitor's price?

Section 2(b) was written before the addition of 2(f).[37] It provided that the burden of rebutting a *prima facie* case by proving cost differences should be upon the *person* "charged with a violation of this section. . . ." When Congress added Section 2(f) later, did it intend to force a buyer who is charged with a violation to prove that differences in his seller's cost justified the discrimination? Or, did it overlook the reference to "person" in Section 2(b) when it blithely added Section (f) to the Act?

As we have seen, the legislative history gives no clue to Congressional intentions.[38] At the most, the history seems to describe

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[37] Note 33 *supra*.

[38] The treatment of price discrimination legislation by both Houses of the 74th Congress was such that it was impossible for members to give careful consideration and concentrated attention to it. In the background were the pressures of various organizations pushing rival bills, proposals and amendments. The moderate F.T.C. proposed legislation, based on its investigation, was largely ignored.

In the Senate, the Robinson Bill (S. 3154) was reported favorably by the Judiciary Committee (S. Rep. 1502) without hearings at the beginning of the 1936 session. Because of the protests, that Committee did hold hearings on the Borah-Van Nuys Bill (S. 4171), but centered attention on the Robinson bill and other proposals and issued no report. The undigested proposals were rushed through the uninformed Senate (the Borah-Van Nuys hearings were not even available at the beginning of the debate) in parts of three days, and the amended Robinson Bill was passed without a roll call. 80 Cong. Rec. 6275, 6436 (1936). The deliberations were spurred on by the prospect of a long week-end recess and the indiscriminate acceptance of numerous amendments (including the swallowing whole of the Borah-Van Nuys Bill) "with the understanding that a final and probably drastically revised version would be worked out in conference." N. Y. Times, May 1, 1936, p. 8; also April 29, p. 6 and April 30, p. 5. One legal commentator described the legislative process as follows:

another legislative accident which rises to haunt all—enforcement authorities, industry and the courts.

(2) *Prior Section 2(f) proceedings.*

FTC proceedings under Section 2(f) before *Canteen* reflect little attention to the need for developing basic policy respecting the proof

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"On April 28, the Robinson Bill was brought up for consideration by the Senate. There the slogan was: 'Let's get the bill through and into Conference. Never mind that amendments are objectionable, wise or unwise. Accept them and get through with it!' There was more or less a tacit understanding that if and when a conference was held, the bill would be completely rewritten. Impelled by this conception of legislative duty, practically all amendments offered on the floor of the Senate were accepted, thus avoiding the careful scrutiny to which not only the amendments but the bill itself should have been subjected. Some of these amendments were actually accepted by those in charge of the bill at the very moment they were pointing out that they were unsound and unacceptable. The resulting hodgepodge was passed on April 30th and sent to the House." Ellison, The Background of the Robinson-Patman Act, 39 Chem. Ind. 135, 136 (1936).

Section 2(f) and the "meeting competition" proviso of section 2(b) are two of the various amendments born in this atmosphere which survived in the statute.

Instead of approving the Senate Bill, the House passed the Patman Bill (H. R. 8442, H. Rep. 2287).

"The resulting confusion was entrusted to a Conference Committee, which after a short conference, reported on June 6, 1936, a measure which was adopted as the present law by both the House and the Senate." Ellison, *op. cit. supra.*

Representative Celler (disapproving conferee) said the Senate managers used their bargaining power to obtain inclusion of Borah-Van Nuys as the price of agreement, and on that basis made concessions in favor of the House version; 80 Cong. Rec. 9419 (1936). During most of the period after the report until June 15th, Congress was adjourned because of the Republican presidential convention. Thereafter consideration of the accomplishment of conference was cursory. *Id.* at 9413-22 (House approval, June 15), and 9902-04 (Senate approval, June 18); Conf. Rep. No. 2951, 74th Cong., 2d Sess. (1936). In the rush to adjourn, only the controversial undistributed profits tax and relief bills were given serious attention. N. Y. Times, June 16, 1936, p. 10. A short time later, Col. William J. Donovan said of the new statute:

"One reason the measure is so difficult to construe is because of the tortuous political and legislative manoeuvres through which it passed. Because of the popular excitement skillfully created, it is doubtful whether any member of the House or Senate was able for any extended period, to consider, calmly and impartially, the full effects of the measure. The act received little attention from the national point of view. The method employed in securing its enactment may be a tribute to the sagacity of the group advocating it, but it is finally an unhappy illustration of the way our national government enacts legislation of widespread importance to producers, distributors, and consumers alike." N. Y. Times, July 9, 1936, p. 8.

required of Commission counsel and of respondents under the Section. Apparently, no respondent forced the issue of justification and the attendant burden of proof. Perhaps the Commission attorneys limited proceedings under this Section to cases which they considered "open and shut." On the other hand, the difficulty of obtaining necessary evidence from suppliers, together with the general uncertainties of proving cost justification, may have persuaded respondents to "go along." The rigidity of the Commission interpretation prior to the *Canteen* proceeding might have discouraged any respondents who were not willing to conduct a long battle of epic proportions.

The FTC concluded eleven proceedings against buyers under Section 2(f) before the Supreme Court opinion in the *Canteen* case. Each of its findings were against the buyer, and it issued cease and desist orders.

These proceedings contributed little to the clarification of the Section. Some respondents either admitted the material allegations[39] or offered no evidence in opposition, stipulated as to material facts and waived other proceedings preliminary to a final order.[40]

In some proceedings the basic issues were conspiracy to fix prices and the Section 2(f) issues were only incidental.[41] In several, the challenged practices fitted more logically under other sections of the

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[39] *Atlas Supply Co.*, 48 F. T. C. 53 (1951) (joint buying subsidiary of five companies combined their buying power to obtain illegal brokerage (§2(c)) and discriminatory prices); *Associated Merchandising Corp.*, 40 F. T. C. 578 (1945) (discriminatory rebates obtained by twenty-two department store members through use of buying cooperative); *National Tea Co.*, 46 F. T. C. 829 (1950), *Miami Wholesale Drug Corp.*, 28 F. T. C. 485 (1939); *American Oil Co.*, 29 F. T. C. 857 (1939); *Pittsburgh Plate Glass Co.*, 25 F. T. C. 1228 (1937); *Golf Ball Manufacturers Ass'n*, 26 F T. C. 824 (1938).

[40] *A. S. Aloe Co.*, 34 F. T. C. 363 (1941) (a predominant distributor of surgical equipment obtained special prices from suppliers).

[41] The conspiracies were charged under the Federal Trade Commission Act, 38 Stat. 719 (1914), 15 U. S. C. §45 (1952). *Pittsburgh Plate Glass Co.*, 25 F. T. C 1228 (1937) (respondents prohibited from limiting and controlling distribution channels; manufacturers prohibited from granting and distributors from accepting discriminatory prices); *Golf Ball Manufacturers Ass'n*, 26 F. T. C. 824 (1938) (manufacturers prohibited from combining to fix golf ball prices and from granting price or service discriminations in favor of P. G. A. members; P. G. A. members prohibited from inducing or receiving any price or service discriminations prohibited of manufacturers).

Act, such as Section 2(d),[42] because they involved payments and allowances for purported advertising. As a matter of fact, some complaints might have been attacked on the grounds that they did not fit Section 2(f). Some of the orders followed the language of Sections 2(d) and 2(e), providing that the buyer could accept certain benefits when they were available to others on proportionally equal terms or to the trade generally.[43] Since Sections 2(d) and (e) are directed against *sellers,* the basis of these orders against *buyers* seems fairly uncertain.

It does not appear that any of the respondents in the earlier cases attempted to justify the lower prices they paid. None of the earlier FTC opinions under Section 2(f) contains findings that a respondent failed to justify its lower purchase prices.[44] Under the FTC's theory of a *prima facie* case, such a finding would have been necessary only if respondent pleaded justification for the lower prices.

Canteen challenged the FTC's theory of a *prima facie* case by an unsuccessful motion to dismiss.[45] The FTC opinion included findings

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[42] Section 2(d) prohibits allowances for services performed by customers not available to their competitors on proportionally equal terms. Section 2(f) cases: *Atlantic City Wholesale Drug Co.,* 38 F. T. C. 631 (1944) and *Miami Wholesale Drug Corp.,* 28 F. T. C. 485 (1939) (allowances from suppliers for advertising in respondent's publication not published in good faith and without substantial value as advertising medium); *National Tea Co.,* 46 F. T. C. 829 (1950) (respondent reimbursed by supplier manufacturers for redemption of product sales promotion coupons).

[43] Proportionally equal terms: *Atlantic Wholesale Drug Co., and Miami Wholesale Drug Corp.,* note 42 *supra; Golf Ball Manufacturers Ass'n,* note 41 *supra.* Available and openly announced prices: *National Tea Co.,* note 42 *supra.*

[44] In a single instance, *E. J. Brach & Sons,* 39 F. T. C. 535 (1944) (purchases of glucose), there is a statement which makes implied reference to the absence of justification:

> "Respondent did not seek to show that the discriminating prices received by it were not discriminations in price prohibited by subsection (a) of Section 2 * * *" Findings, par. 11, 39 F. T. C. at 547.

In one other, *Curtiss Candy Co.,* 44 F. T. C. 237 (1947), *order modified,* 48 F. T. C. 161 (1951) (purchases of glucose), the F. T. C. indicated in some respect its opinion of the relation between a lower price knowingly received and a prohibited discrimination, in which there is inferentially an absence of justification.

> "The Commission finds that the discriminations in price knowingly induced and knowingly received * * * were price discriminations prohibited by section 2 * * *" Findings, par. 9, 44 F. T. C. at 260.

[45] *Automatic Canteen Co. of America* v. *F. T. C.,* U. S. S. Ct. Oct. term, 1952, No. 89, Transcript of Record, 14-7.

that Canteen had made no attempt to show that any of the price differences were justified by suppliers' costs.[46]

None of the prohibitions contained in the orders provides guideposts for future proceedings. Some were outright prohibitions against paying lower prices than those offered to the trade by the sellers.[47] Some prohibited receiving discriminations which violated Section 2(a).[48] Some early orders were limited to price differences that exceeded cost differences.[49] One recent order states that it does not preclude a future showing of cost justification by the respondent.[50]

The Anti-Trust Division has initiated no Section 2(f) proceedings,[51] and there has been no private litigation of any importance.[52]

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[46] Findings, par. 9(c), 46 F. T. C. at 882.

[47] E.g. *E. J. Brach and Sons*, note 44 *supra*; *A. S. Aloe Co.*, note 40 *supra*. Many of them prohibit discriminations of the type exemplified by the findings: e.g. *Curtiss Candy Co.*, note 44 *supra*; in orders against buyers in proceedings in which they were joined with sellers, the orders prohibit receipt by buyers of those discriminations whose granting by sellers was prohibited: *American Oil Co.*, *Pittsburgh Plate Glass Co.*, and *Golf Ball Manufacturers Ass'n*, note 39 *supra*.

[48] *National Tea Co.* and *Associated Merchandising Corp.*, note 39 *supra*; *E. J. Brach and Sons*, note 44 *supra*; *A. S. Aloe Co.*, note 40 *supra*.

[49] *A. S. Aloe Co.*, note 40 *supra*; *American Oil Co.*, note 38 *supra* (prohibited "except where * * *").

[50] *Atlas Supply Co.*, note 39 *supra*.

[51] However, the important criminal case against the A&P under the Sherman Act consisted largely of practices within the scope of various sections of the Robinson-Patman Act including §2(f). *United States* v. *New York Great United Atlantic and Pacific Tea Co.*, 173 F. 2d 79 (7th Cir. 1949), *aff'g* 67 F. Supp. 626 (E. D. Ill. 1946). The Sherman Act charges pertained both to inducement and receipt of price discrimination, discriminatory receipt of services or allowance for services, and illegal receipt of brokerage or its equivalent.

> "Whether or not A&P in inducing and knowingly receiving these price discriminations was in violation of the Robinson-Patman Act, as its suppliers certainly were, the advantage which A&P thereby obtained from its competitor is an unlawful restraint in itself." 173 F. 2d at 88.

See also 67 F. Supp. at 645-9:

> "[T]hough defendants have been careful to secure from their vendors avowals of compliance with the Robinson-Patman Act, they have been far from meticulous in acceptance of preferences which, under the facts and circumstances they knew or should have known other purchasers did not receive and that they so acted as to procure preferential discounts either under that term or other terms resulting in an unfair competitive advantage." 67 F. Supp. at 649.

(3) *The Robinson-Patman campaign in the candy industry.*

The *Canteen* proceeding seems to be one phase in a Commission campaign to promote competition in the candy industry. The campaign is significant mainly because it reflects an administrative problem in applying Robinson-Patman policy. If Robinson-Patman price policy is effectively enforced against manufacturers, will competition be promoted automatically down the line of distribution to the final consumer; or does Robinson-Patman price policy have to be enforced against both buyers and sellers at each sales point?

Another interesting aspect of the candy campaign should be noted, parenthetically. Can enforcement of the Robinson-Patman Act be significant and equitable if it deals with isolated respondents; or does it require enforcement on an organized industry basis?

The *Canteen* proceeding was one of a series against concerns which are engaged in successive phases of the candy industry: (a) glucose manufacturers, (b) candy manufacturers as buyers of glucose, (c) the same manufacturers as sellers of candy and (d) a candy wholesaler *(Canteen)*. The campaign seems to be based on a theory that discriminations at a primary level will help to breed discriminations at successive levels of manufacture and distribution.

a. *Glucose manufacturers.* Seven separate proceedings were started in October, 1938 and in June, 1939, attacking the pricing

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In resorting to the Sherman Act the Division did have the intensely practical advantage of a conspiracy theory, which made the cost justification issue immaterial; Note, Intra-Enterprise Conspiracy under the Sherman Act, 63 Yale L. J. 372, 377 (1954).

[52] *Kainz* v. *Anheuser-Busch, Inc.*, 194 F. 2d 737 (7th Cir. 1952) was a class action by liquor store operators against a beer producer and wholesale distributor as seller and a competing retail distributor as buyer for alleged price discriminations granted and knowingly received; plaintiffs were permitted to bring a class action. *American Cooperative Serum Ass'n* v. *Anchor Serum Co.*, 153 F. 2d 907 (7th Cir. 1946), *cert. denied*, 329 U. S. 721, 826 (1946), against seller and buyer, involved §§2(d) and (f) charges but the violation described in the opinion appeared to fall within §2(d) only. May 24, 1954, fifteen Chicago area Hudson automobile dealers filed suit against a competitor, Hudson's largest dealer, Courtesy Motor Sales, Inc. (but not against Hudson Motor Car Co.) under the Sherman Act and §2(f) alleging that Courtesy obtained special allowances from Hudson enabling it to undersell plaintiffs; Wall Street Journal (Chicago ed.) May 24, 1954.

methods of a large part of the glucose industry.[53] Six of these[54] were "basing point" cases, aimed at systematic geographical price discrimination, but with overtones of industry price agreement.[55] Six of the companies[56] were also charged with other discriminations in granting certain customers (1) tank *wagon* deliveries at tank *car* prices, which are lower, and (2) extended delivery options on existing orders which permitted the customers to buy glucose at the old prices after price increases had been announced. The FTC issued prohibiting orders against all respondents, and the *Corn Products* and *Staley* orders were upheld on appeal to the Supreme Court.[57] The Commission held

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[53] *Corn Products Refining Co.*, 34 F. T. C. 850 (1942), *aff'd*, 324 U. S. 726 (1945); *A. E. Staley Mfg. Co.*, 34 F. T. C. 1362 (1942), *aff'd*, 324 U. S. 746 (1945); *Clinton Co.*, 34 F. T. C. 879 (1942); *The Hubinger Co.*, 32 F. T. C. 1116 (1941); *Penick & Ford, Ltd., Inc.*, 31 F. T. C. 1494 (1940); *Union Starch & Refining Co.*, 32 F. T. C. 60 (1940); *American Maize-Products Co.*, 32 F. T. C. 901 (1941). The last four companies stipulated with Commission counsel as to facts; Penick and American did so in lieu of requiring evidence in support of the complaint; Hubinger and Union offered no evidence in opposition.

[54] Excluding *American Maize-Products.*

[55] The probable reason for the Robinson-Patman approach was unfavorable precedent in price and uniformity basing point cases: *Cement Manufacturer's Protective Ass'n* v. *United States*, 268 U. S. 588 (1925) (Sherman Act); see also *F. T. C.* v. *Cement Institute*, 333 U. S. 683 (1948), a successful attack on concerted basing point uniformity under the Robinson-Patman and Federal Trade Commission Acts decided after Corn Products and Staley. The underlying character of the glucose cases is suggested by a single succeeding proceeding started in June, 1947, against the same companies (including American Maize) and one other (National Starch Products, Inc.) accounting for 95% of the domestic manufacture and sale of corn derivatives. The complaint charged violation of the Federal Trade Commission and Robinson-Patman Acts. A consent cease and desist order prohibits (1) uniform basing point sales price systems or (2) any other uniform selling price system, *if* and *to the extent* that they are made pursuant to "any planned common course of action, mutual agreement, understanding, combination or conspiracy." *Corn Products Refining Co.*, 47 F. T. C. 587, 660 (1950). The initial reports of the nature of this order were of such character that the F. T. C. found it necessary to issue a statement that

> "[T]he proposed order would prohibit use of basing point and zone systems of pricing only when such systems involve concerted action, conspiracy or unlawful agreement among sellers of corn products." CCH Tra. Reg. L. Rep. ¶14,396 (1950).

[56] Excluding *Penick & Ford.*

[57] *Corn Products Refining Co.* v. *F. T. C.*, 324 U. S. 726 (1945), *aff'g* 144 F. 2d 211 (7th Cir. 1944); *F. T. C.* v *A. E Staley Manufacturing Co.*, 324 U. S. 746 (1945), *rev'g* 144 F 2d 221 (7th Cir. 1944).

that the discriminations were significant because glucose represents an important raw material cost of candy manufacturers.

b. *Buyers of glucose.* In other proceedings, the FTC found that two candy manufacturers, Curtiss and Brach, violated Section 2(f) in knowingly receiving the benefit of price discriminations from some of the glucose manufacturers discussed above.[58] These proceedings were started in July and August, 1941. The FTC found that the buyers benefited from price preferences concealed by such methods as: purchases at old prices after price increases; advance booking of orders before general announcement of price increases; unauthorized deductions from invoice prices, purportedly to meet competitive prices of other suppliers.[59] No basing point issues were involved in these proceedings.

c. *Candy manufacturers.* In another set of proceedings, a number of manufacturers were charged with selling their candy products at discriminatory prices.[60] The complaint against Curtiss[61] charged it with selling candy in violation of Sections 2(a), (d) and (e) and Section 3 of the Act; this proceeding was merged with the one charging Curtiss with buying glucose in violation of Section 2(f) (see b. above). Most of the complaints alleged that the respondents had discriminated in favor of Canteen, and the findings in the *Curtiss* and *Johnson* proceedings described those discriminations in some detail.

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[58] *Curtiss Candy Co.*, 44 F. T. C. 237 (1947); *E. J. Brach & Sons*, 39 F. T. C. 535 (1944).

[59] The finding in the *Brach* proceeding included a conclusion that Brach had induced lower prices by misrepresenting to suppliers the prices offered by competitors.

[60] *Walter H. Johnson Candy Co.*, 44 F. T. C. 1021 (1948) (F. T. C. Dkt. 4677) (prohibition against preferential sales to the large vending machine companies in the absence of justifiable cost differentials).

Wayne Candies, Inc., et al., F. T. C. Dkts. 5544-53 ten complaints issued May 19, 1948 and *Minter Brothers, et al.*, F. T. C. Dkts. 5596-5619, 24 complaints issued October 28, 1948. All 34 were later dismissed without prejudice; *New England Confectionery Co.*, 46 F. T. C. 1041, 1061-3 (1949) (F. T. C. Dkt. 5605). The complaints alleged that prices paid by Canteen, which were less than those paid by its competitors, violated §§2(a), (d) and (e), and in some cases (c). The Commission concluded that the multiplicity of charges concerning the same practice were unnecessary and that some charges did not state a case.

[61] *Curtiss Candy Co.*, F. T. C. Dkt. 4673, complaint issued January 21, 1942, 44 F. T. C. 237 (1947), *order modified*, 48 F. T. C. 161 (1951).

Those two proceedings were started in January, 1942. The other 34 complaints were issued in May and October, 1948, but were dismissed in September, 1949 because of infirmities in pleading.

The Curtiss findings are representative of the FTC charges. Curtiss, the largest candy bar manufacturer, sold about three per cent of its production to vending machine distributors, including Canteen. Its jobber customers of candy bars competed with the vending machine distributors while store retailers competed with vending machine retailers. Curtiss sold at varying prices, but it charged Canteen the lowest prices.[62]

Curtiss could not prove, to the Commission's satisfaction, that its price differentials were justified by cost differences.[63] Part of the difficulties encountered in proving cost differences are reflected in the Commission's findings.

> "The respondent . . . offered testimony and other evidence in an attempt to justify its price differentials to various customers. Respondent's system of accounting provides for the distribution of sales, costs, and expenses of eight classes of products. On the books of the company many of the items were not broken down but were charged to a general account so that it was impossible to prorate or allocate the costs and expenses or the sales on an actual operative basis. Consequently, the respondent attempted to make a proration or allocation on the basis of dollar sales in the cost justification submitted. The respondent had made no actual cost survey or study which would afford any basis for a determination that such allocation on the basis of dollar sales was an accurate or true method. The allocation or proration so made could, and did, amount to nothing more than an estimation on the part of respondent's accountant." 44 FTC at 267.

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[62] The standard price of the 24-bar box was about 2-2/3 cents per bar, with some concessions from that price. The regular price for the 60-bar box was about 2-1/4 cents per bar, with somewhat lower prices to certain large vending machine customers. The 100-bar box was available only to Canteen at 2.1 cents delivered or 1.98 cents f.o.b. Chicago only. Findings, pars. 10, 12, 13(1), 44 F. T. C. at 260-2.

[63] Findings, par. 16, 44 F. T. C. at 268. It was specifically found that the prices to the vending machine companies, including Canteen, were not justified. Curtiss also granted service preferences to certain customers in the form of special discounts, special booking privileges and "free deals" which the Commission concluded violated §§2(d) and 2(e), Findings, par. 18, especially 18(12) (free candy to Canteen for

The FTC found that Curtiss' price discrimination substantially affected competition.[64] It felt that the discriminations permitted favored customers to undercut competitors and take business from them. Since all types of candy retailers are in competition, the favored group enjoyed a considerable competitive advantage. It also found the candy jobbers were hurt by the lower price charged to such vending machine operators as Canteen because: (1) those operators did not buy from jobbers, and (2) candy sales through vending machines reduced the jobber's sales to conventional retailers. Finally, since Canteen paid lower prices than other vending machine companies, it had a further competitive advantage: it could afford to pay more for choice machine locations.[65]

Curtiss' failure to prove cost justification, to the Commission's satisfaction, is a significant factor in analyzing Canteen's position. This failure is important regardless of what caused it: because no cost differences could possibly be proved, because Curtiss was not seriously inclined to prove costs, or because of deficiencies in establishing proof of cost differences which do exist. In the later *Canteen* proceeding, the FTC required that Canteen prove differences in Curtiss' costs—a task which Curtiss, itself, was unable or unwilling to carry on in its own behalf. What sort of cooperation could have been expected from Curtiss if Canteen had tried? How could Canteen obtain the necessary cost data from about eighty such suppliers?

The Canteen Proceeding

The case. On March 19, 1943, the FTC issued a complaint[66] charging that Canteen had knowingly induced and received price dis-

display). *Id.* at 270-2. In addition, a violation of section 3 in the sale of candy to some customers was also proved. *Id.* at 272-3.

[64] See Findings, par. 17, 44 F. T. C. at 268-9. The original order against Curtiss prohibited price discounts of more than ½ cent per case to vending machine customers. The order was modified later to eliminate the specific limit on price discounts.

[65] "Vending machine operators who did not get the low prices extended by the respondent to Confection Cabinet Co., Automatic Canteen, and Berlo Vending Co. suffered reduced profits and loss of machine locations in several instances, resulting in decreased sales. The lower price to the favored vending-machine operators enabled them to earn more profits, provide more facilities and better services, give more aid to their distributors, and pay a higher rate of commission for preferred locations." 44 F. T. C. at 269.

[66] *Automatic Canteen Co. of America,* FTC Dkt. 4933; the complaint is printed at 46 F. T. C. 861, 866-72 (1950).

criminations on purchases of confectionary products.[67] Canteen's answer was a general denial.[68]

Canteen's business consists of: (1) leasing vending machines to its distributors, and (2) selling standard candy, gum, nuts and other confectionary products to its distributors for resale in the machines. Canteen purchases both the machines and confectionary products and does no manufacturing.[69]

After its formation in 1931, Canteen grew rapidly and assumed what the FTC called a "dominant position" in its industry. The Commission attributed this growth "primarily" to two alleged Clayton Act violations.[70] In 1946, Canteen leased 230,000 vending machines to 83 distributors operating in 33 states. Annual sales of confectionaries through the machines were over $14,000,000 in 1944.

About 80 of its 115 suppliers sold confectionaries to Canteen at lower prices than they charged its competitors. The discounts ranged between about 1% and 33%.[71] Canteen bought at the lowest prices

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[67] In Count II. Count I charged Canteen with exclusive dealing in violation of section 3 of the Clayton Act in not permitting its distributors to use vending machines other than Canteen's and by requiring them to purchase from Canteen all of the candy distributed through the machines and to distribute through the machines all of the candy purchased from Canteen. The FTC's finding of violation of section 3, 46 F. T. C. 861, 876-81 (1950) (Findings, pars. 6, 7, 8), was affirmed on appeal, *Automatic Canteen Co. of America* v. *FTC*, 194 F. 2d 433, 436-7 (7th Cir. 1952), and was not before the Supreme Court, 346 U. S. 61, 82 (1953).

[68] 194 F. 2d at 435.

[69] Although it has done much work in developing more versatile machines for use in its business—such as selective vending machines.

[70] Findings, par. 12(a), 46 F. T. C. at 886. The Commission made computations which satisfied it that practically the entire gross profit of the Company was realized through preferential prices from suppliers. Findings, par. 9(e), 46 F. T. C. at 883.

[71] Comparative candy bar prices for 100, 60 and 24 bar boxes sold at wholesale were (per bar):

	Standard Trade Prices			*Canteen*
	24	60	100	100
1936–1942	2.67c	2.5 c	2.5 c	1.95 to 2.25c
1942 and after	2.83	2.67	2.65	2. to 2.62

The above prices to Canteen are the range for suppliers granting any discount to Canteen. Findings, par. 9(a), 46 F. T. C. at 881. Standard prices were delivered prices; Canteen prices were f.o.b. Chicago only. Other vending machine companies also obtained prices more favorable than standard.

Fourteen of the 80 suppliers granting preferences to Canteen were cited in the complaint as representative, and evidence of their prices was introduced. Complaints under

it could obtain. In many instances its officials knew that it paid less than its competitors.[72]

Following their theory of Section 2(f), Commission counsel did not attempt to prove that the price differentials were not justified by cost savings. Nor did they try to show that Canteen knew that the discounts were unjustified.[73] Canteen argued that the Commission counsel had not proved a violation of the Act and moved to dismiss the complaint. When its motion was denied, Canteen offered no evidence.[74]

The FTC found that Canteen had violated Section 2(f). It found that the respondent "knowingly induced, and knowingly received, lower prices" from its suppliers than the prices they charged others.[75] To the FTC, this was a *prima facie* showing of violation:[76] "The price

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section 2(a) were issued against twelve of them: Curtiss and Johnson in January 1942 and ten others (FTC Dkts. 5544-53) in May 1948, notes 60 and 61 *supra;* numerous other complaints were also filed against suppliers of Canteen. *Id.*

72 Findings, par. 113(a) 46 F. T. C. at 887-8.

73 Certain letters from suppliers negotiating with Canteen were introduced and cited only to show Canteen's knowledge of the price differences; these letters alluded to the unprofitability of existing or proposed prices. *E.g.* Findings, par. 13(a), 46 F. T. C. at 887-8. Incidental remarks of that type would not support a finding that cost justification was lacking, and the FTC made no such finding. Such statements might be made solely for the purpose of bargaining or might likely be based upon conventional (average) cost data. As evidence they would be relevant to the issue of what would be necessary to put Canteen on inquiry of non-justification and whether it was put on inquiry; 346 U. S. at 66n. 4. When placed in their context, however, they do not necessarily imply a §2(a) violation in themselves. (A contrary inference was drawn in the Supreme Court dissent; 346 U. S. at 85n.)

The FTC found Canteen's methods of inducing lower prices included the following: (1) it would make a bid or offer of price and terms at which it would buy or would offer to pay only an amount less than the seller's standard price, in either case without inquiry into the seller's ability to justify such price; (2) it would advise a supplier that its purchasing methods and elimination of services could result in savings to the seller of specified percentages; Findings, par. 13(b), 46 F. T. C. at 888. The former is a normal and usual price bargaining procedure. The latter in no way binds Canteen to the actual but (to it) unknown costs of its seller; in fact on its face, it supports an argument that Canteen had no good reason to be on inquiry of non-justification. (Again the Supreme Court dissenters thought otherwise; 346 U. S. at 83-4.)

74 194 F. 2d at 435.

75 Findings, pars. 9(a), 13(a), 46 F. T. C. at 881, 887.

76 In an accompanying opinion the Commission said,

> "The statute places squarely on the respondent the burden of showing price differentials are thus justified," citing *FTC* v. *Morton Salt Co.*, 334 U. S. 37 (1948). 46 F. T. C. at 896.

differences [in Canteen's favor] constitute discriminations in price between purchasers." [77] "Respondent made no attempt to show that any of the price differences received from . . . supplier make only due allowance for differences in cost . . ." [78]

The Commission felt that competition in candy distribution is so keen and margins are so narrow that, "any differential or discrimination in the price . . . may result in a substantial diversion of business." [79] Canteen realized greater profits than its competitors because it paid lower prices. This enabled it to provide extensive "accounting, new business, sales, operations, . . . engineering, and . . . traffic" services to its distributors.[80] According to the FTC, these services enabled Canteen's distributors to pay larger fees for locations for the vending machines than their competitors could afford. Further, better locations are the key factor in competition between vending machine retailers.

The FTC held that these advantages diverted an increasing volume of business to Canteen and its distributors. Many concerns were hurt competitively because of the discrimination; manufacturers, jobbers, wholesalers and retailers of candy and manufacturers and operators of vending machines.[81] The test of substantial effect on competition was met, to the Commission's satisfaction. Hence, the inducement of such "discriminations" violated Section 2(f).[82] Neither this nor the other opinions in the several stages of *Canteen* referred to the competitive struggle of old and new methods of distribution—counter selling and automatic vending—which naturally have different price, cost and profits structures.[83]

The order prohibited Canteen from purchasing at prices lower than other customers of a seller, unless it could show that the seller's cost savings justified the difference.[84]

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77 Findings, par. 9(d), 46 F. T. C. at 882.

78 Findings, par. 9(c), 46 F. T. C. at 882.

79 Findings, par. 11(b), 46 F. T. C. at 884.

80 Findings, par. 11(c), 46 F. T. C. at 885.

81 Findings, pars. 10, 11, 46 F. T. C. at 883-6.

82 46 F. T. C. at 889 (conclusion).

83 The distinctive characteristics of selling with vending machines are described by J. R. Schreiber in Automatic Selling (1954) (especially pp. 32-8).

84 Order, par. II, 46 F. T. C. at 891.

On appeal,[85] the main issue—whether a buyer must prove its seller's cost justification—was decided on a literal reading of statutory language. The Court of Appeals accepted the FTC theory that: a price differential is the discrimination referred to in the statute; and proof of the existence of a differential shifts the burden of cost justification to the person charged with a violation. The court found that there is no basis in the language of Sections 2(a), (b) and (f) for distinguishing the position of buyers from that of sellers, because the language of Sections 2(a) and (f) is parallel. It is equally unlawful for a buyer knowingly to receive the benefit of a price discrimination as it is for a seller to grant it. Therefore, the buyer, like the seller, must prove that the seller's costs justify the price differences. The court did not consider whether the positions of buyer and seller were so dissimilar that the statute should be read more broadly. It did say, with masterly underemphasis, "It is no doubt true that it is more difficult for a buyer to establish his seller's cost justification than it is for the seller from whom he bought." [86]

In marked contrast to the Court of Appeals, the Supreme Court raised its vision beyond the statute pages.[87] Certiorari was granted to consider whether the FTC conception of Section 2(f) would leave buyers so vulnerable to attack that rigid prices would be encouraged. This would be contrary to the objectives of anti-trust law.[88]

In the majority opinion, Mr. Justice Frankfurter set the scene by describing the enormous difficulties which would face a buyer who tried to show a cost justification of its seller's prices.[89] The analysis was based on a new expression of the issues, one which had not theretofore been employed in the case. First was a preliminary issue: what is the substantive violation for which a buyer may be held liable?

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85 194 F. 2d 433 (7th Cir. 1951).

86 194 F. 2d at 438. This was in comment on Canteen's argument that the FTC's construction of the statute deprived it of due process. Canteen had introduced nothing to support its claim of impossibility, and the court was unwilling to assume either that the facts supported any such conclusion or that the FTC did or would impose an impossible burden. It later refused Canteen a rehearing and admission of evidence of impossibility for untimeliness. 194 F. 2d at 439.

87 346 U. S. 61 (1953).

88 346 U. S. at 63.

89 346 U. S. at 68-9.

The second, and the main, issue: which party has the burden of coming forward with evidence of each element contained in proof or justification of a violation? Previously the issue had always been argued as a single "burden of proof" problem.

The opinion pointed out that the prohibition in Section 2(f) is related to the prohibitions in Section 2(a). It found, further, that sellers may grant lower prices which can be justified by cost savings.

Contrary to the FTC theory, therefore, the Court held that the discrimination prohibited by Section 2(f) can be only an *unjustified* differential. This does not necessarily carry over to any application of Section 2(a), which covers sellers and which refers to "discrimination" in contrast with (f) which refers to "discrimination in price . . . which is prohibited by this section." [90]

The opinion proceeds with the point that for adequate proof of a violation the FTC must show that the buyer *knew* that the differential was unjustified, in addition to showing the existence of an unjustified differential. The FTC theory would deprive the word "knowingly" of almost all meaning. It might endanger the vigor of price bargaining generally. Further, the Commission offered no compelling reason for a holding which might vitiate other anti-trust policy. Mr. Justice Frankfurter concluded, therefore, that "a buyer is not liable under §2(f) if the lower prices he induces are either within one of the seller's defenses such as the cost justification or not known by him not to be within one of those defenses." [91]

This led to the second and main issue, the procedural "burden of introducing evidence," [92] after it is shown that the buyer knowingly received a price discount. This issue revolved around evidence as to: (1) the seller's costs; and (2) the buyer's knowledge of them.

In a less involved statute the procedural burden normally falls on the proponent of the substantive case. But the FTC maintained

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[90] 346 U. S. at 70-1. It was therefore unnecessary for the Court to express an opinion on whether the substance of a seller's discrimination in violation of §2(a) is an "unjustified differential" or a mere "differential." The parties had hinged their arguments on this question, which in the normal course might have resulted in a sweeping opinion regarding sellers, but which was outside of the scope of the *Canteen* case.

[91] 346 U. S. at 74.

[92] *Id.*

that Section 2(b) placed the burden of justification "upon the person charged with a violation," [93] whether the "violation" was by a seller under Section 2(a) or a buyer under Section 2(f). Canteen challenged this interpretation. Alternatively, it argued that Section 2(b) had no application to a violation of Section 2(f).[94] The litigants engaged in an intricate argument over the meaning and relation of the language of the statute.

In treating this issue, Mr. Justice Frankfurter relied upon "considerations of fairness and convenience," [95] which he was sure must underlie the Act. He cut through the abstruse arguments over the involved and confused language of the statute. Presuming fairness, he concluded that the "infelicitous language" of Section 2(b) only codified ordinary rules of evidence. Therefore, he found it unnecessary to decide whether or not Section 2(b) applied to procedures under 2(f). In cases against buyers, the burden of showing seller's costs and buyers' knowledge of them should fall on the FTC. The buyer should not be required to obtain the seller's costs since the FTC has superior means of obtaining them.[96]

The Court did not explore the type of proof that might be required from the FTC in showing that the price differences were *not* justified by costs. It established that the burden of proof is on the FTC.[97] However, since no costs, or theories about costs, were introduced in the case, the court was not called on to determine whether or not the FTC proof of cost must be of equal scope with that of a seller in a Section 2(a) proceeding.[98]

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[93] 346 U. S. 76. The Commission argued that §§2(a) and 2(f) were counterparts and since the *Morton Salt* case had held that a showing of differential prices shifted the burden of justification to a seller, such a showing plus knowledge to the buyer of the differential must shift the same burden to a buyer. *Id.*

[94] Based on the legislative chronology of §§2(f) and 2(b), note 33 *supra*, and other language addressed peculiarly to sellers: (1) "a seller" may rebut by showing a meeting of competition; (2) "an order terminating the discrimination" could not be issued against buyers to any effect. 346 U. S. at 77n. 19 and text.

[95] 346 U. S. at 78 (and 74).

[96] 346 U. S. at 78-79.

[97] *Id.*

[98] Mr. Justice Frankfurter's carefully chosen words might imply that the Supreme Court has changed its view of the seller's burden of cost justification since *FTC v. Morton Salt Co.*, 334 U. S. 37, 44-5 (1948). The *Canteen* opinion paraphrases the

Various dicta were set forth regarding the requirement of knowledge. They were intended as guides to administrative judgment, on remand of the *Canteen* case and in other proceedings.[99]

The short dissenting opinion, in substance, echoed the points of view of the Court of Appeals and FTC. One new feature was added—a critical but unparticularized condemnation of Canteen's buying relationships with its suppliers.[100] The description was expressive, employing such terms as "wheedling"—"coercing"—"bizarre"—"wield clubs"—"pressure"—"bludgeon." [101]

The dissenters' view seems to reflect a conviction that Canteen had engaged in predatory tactics against its suppliers. If this were a

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FTC interpretation of *Morton Salt* as placing on a seller the "burden of showing a cost justification." 346 U. S. at 76. It has been generally considered that a seller's claim of cost justification is an affirmative defense of confession and avoidance, requiring the proponent to establish a prima facie case of such justification to warrant a finding in its favor. Austin, Price Discrimination and Related Problems under the Robinson-Patman Act, 88 (rev. ed. 1954); *Minneapolis-Honeywell Regulator Co.*, 44 F. T. C. 351, 394 (1948) ("respondent's burden * * * is very great"), *rev'd on other grounds*, 191 F. 2d 786 (7th Cir. 1951), *cert. dismissed for untimeliness*, 344 U. S. 206 (1952); *Standard Oil Co.*, 41 F. T. C. 263, 282 (1945) (with prima facie case of differential, "burden then shifts to the respondent"), *rev'd on other grounds*, 340 U. S. 231, 241 (1951) (dictum that FTC opinion recognizes "'absolute defense * * * for a seller to prove" cost justification). According to *Canteen* opinion, however, *Morton Salt* interpreted §2(b) to the effect that the seller's burden of cost justification is one "of coming forward with evidence of a cost justification." 346 U. S. at 77. Under such a burden, a finding for seller would be warranted by the mere showing of evidence sufficient to throw doubt on the presumption that differences are unjustified. In some cases, fragmentary evidence, general statistics or trade information would be enough without a full cost presentation. Mr. Justice Frankfurter's use in *Canteen* of the term "burden of introducing evidence" rather than "burden of proof" is not casual, but on the contrary, is a matter of precision. "[W]e have dealt only with the burden of introducing evidence and not with the burden of persuasion, as to which different considerations may apply." 346 U. S. at 82.

Admittedly he also said that the burden is placed "on the one * * * who claimed the benefits of the justification." 346 U. S. at 77. A reference to this rule of statutory construction in *Morton Salt* states a principal holding, which does not lend itself to graceful reinterpretation. 334 U. S. 44-5.

The language of §2(b) seems self-contradictory to some degree since it imposes on respondent "the burden of *rebutting* the prima facie case * * * by showing justification * * * *and* unless justification shall be *affirmatively* shown * * *" an order shall issue. "Rebutting" one inference is not the same as "showing" another.

99 346 U. S. at 79-81.

100 346 U. S. at 83, 84-5.

101 346 U. S. at 83-5.

Sherman Act case, their observations would certainly be pertinent to the issue. If their characterizations are accurate, a Sherman Act or Federal Trade Commission Act case might well be in order.[102]

However, the Robinson-Patman Act does not seem to be an appropriate tool for measuring and evaluating such predatory practices. The key question in Robinson-Patman proceedings is: did deviations from a uniform price policy exceed the permissible limits of the statute? The dissenting justices appeared to want to confine these limits stringently because they believed that Canteen's tactics were predatory. But their standards, as enunciated in this case, would be applied to *all* buyers who bargained for lower prices, whether their behavior was predatory or not.

When the decision was announced many felt that it was the deathknell for the enforcement of Section 2(f). The Commission dismissed three complaints, *Safeway, Kroger* and *Sylvania (Philco),* without prejudice in final orders because Commission counsel admitted that the evidence was insufficient to prove the buyer's knowledge of discriminations to the degree required by the *Canteen* opinion.[103]

More recently the FTC has refused to dismiss two proceedings against group buying organizations, *Borden-Aichlen* and *D. & N.*[104] Unlike *Kroger* and *Safeway,* the motions to dismiss in the latter proceedings claimed that the allegations were insufficient to state a violation. In accord with the FTC's pre-*Canteen* theory, the complaints make no specific assertions that respondents knew their sellers could not justify the lower prices. But it was felt that the complaints did charge that respondents "knowingly induced . . . discriminatory

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102 Consider the *A&P* cases, notes 20, 21, 51, *supra.*

103 *The Kroger Co.,* CCH Tra. Reg. L. Rep. ¶11,513 (F. T. C. 1953) and *Safeway Stores, Inc.,* CCH Tra. Reg. L. Rep. ¶11,474 (F. T. C. 1953). The substance of the complaints in those proceedings was the same. No evidence had been taken in either proceeding. *Sylvania Electric Products, Inc.,* CCH Tra. Reg. L. Rep. ¶11,585 (F. T. C. 1953) (as to purchaser Philco); no appeal was taken by commission counsel from the examiner's dismissal, CCH Tra. Reg. L. Rep. ¶25,181 (F. T. C. 1954) (complaint against Sylvania's dismissed).

104 *Borden-Aichlen Auto Supply Co.* and *D & N Auto Parts Company,* CCH Tra. Reg. L. Rep. ¶11,710 (F. T. C. 1954).

prices" [105] which apprised respondents of the nature of the proceedings and of what Commission counsel must prove in conformity with *Canteen*. Another similar complaint is pending.[106] However, the FTC has dismissed *Crown Zellerbach*[107] in which the complaint contained a similar allegation.

And now it has dismissed *Canteen*,[108] which lasted more than a decade.

(*To be continued in our December Issue.*)

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105 Paragraph five of both complaints.

In *Kroger*, the initial decision of the examiner dismissed the proceeding on the ground that the failure to allege knowledge of seller's §2(a) violation failed to state a §2(f) violation; CCH Tra. Reg. L. Rep. ¶11,450 (F. T. C. 1953). The Commission's final dismissal noted that this was a mistaken ground, and in *Borden-Aichlen* and *D&N* the Commission pointed out that if a deficiency of allegation had existed, the complaint could have been amended without dismissal. The dismissal of Philco in the Sylvania proceeding was based upon the statement that "the allegations of the complaint and proof [are] insufficient to constitute a violation * * *"

106 *American Motor Specialties Co., Inc.*, F. T. C. Dkt. No. 5724, complaint issued December 20, 1949, is the same in substance as *Borden-Aichlen* and *D&N*.

107 *Crown Zellerbach Corporation*, CCH Tra. Reg. L. Rep. ¶25,352 (F. T. C. 1953).

108 CCH Tra. Reg. L. Rep. ¶25,312 (F. T. C. 1955).

GOVERNMENT LAWYER

by

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INTRODUCTION

by

HON. JEROME N. FRANK

ANTITRUST NEWSLETTER

United States Supreme Court Developments — October Term — 1955

No significant developments at press time (see last issue at p. 337).

Other Federal Courts Developments

No significant developments at press time.

Department of Justice Activity

Lyman Gun-Sight Corp., et al.

On November 15, 1955 three manufacturers, a distributor and three publishers were indicted on charges of violating Section 1 of the Sherman Act in connection with the sale and advertising of optical rifle scopes. The gist of the charge is that the defendants conspired to exclude "cut-rate" dealers from the industry and to have their advertisements rejected by magazine publishers.

The Department announced that the institution of criminal action was in line with the announced policy to obtain indictments wherever *per se* violations exist.

Brown Shoe Co. and G. R. Kinney Co.

The Government obtained a temporary order restraining the proposed acquisition by Brown of outstanding stock in Kinney, claiming that the acquisition would violate Section 7 of the Clayton Act. In addition, the Government seeks to enjoin Brown from acquiring the stock or assets of any other corporation engaged in the shoe business. Brown is engaged in the manufacture, distribution, and sale of shoes, whereas Kinney is engaged in the retail field. The Government claims that if Kinney's merger with Brown is consummated, competition between Brown and Kinney will be eliminated and competitive manufacturers may be foreclosed from the market represented by the acquired outlets.

Cigarette Merchandisers Association Inc., et al.

The District Court for the Southern District, after accepting *nolo contendere* pleas, imposed a six months' suspended sentence on the Association's secretary and a three months' suspended sentence on the Union's secretary, in addition to the imposition of fines. The defendants were charged with having conspired to eliminate competition among cigarette vending machine operators in the New York metropolitan area.

Editorial

On November 3, 1955, the Editor wrote a letter to Judge Stanley N. Barnes, Chief of the Antitrust Division of the Department of Justice regarding the Department's policy reasons behind the simultaneous filing of civil and criminal actions. Judge Barnes, a man we have all learned to respect because of his great integrity, promptly answered. The antitrust bar has expressed interest in this particular phase of Department policy and therefore we reproduce this letter for the benefit of our readers.

Dear Mr. Zaidins:

Your letter of November 3, 1955, inquires about the Department's policy in handling civil and criminal antitrust actions. You ask why civil and criminal actions are filed simultaneously and why the civil action is suspended until the criminal is terminated.

We have no policy requiring simultaneous filing of civil and criminal proceedings. Once the Department determines, on the basis of its investigations, that an antitrust violation exists, it proceeds to take such action as it feels will provide the most effective remedy. As a general rule, it is necessary to remove the effects of the restraint and to prevent the parties from continuing the trade restraining practices. Only a civil decree can furnish such relief. It is therefore felt necessary to bring a civil action in most cases. Yet, the antitrust laws are criminal statutes and it is our duty to enforce their penal sanctions when we feel the situation is such as to warrant punishment. For this reason, both civil and criminal actions are felt necessary in many situations.

It frequently happens that when we decide both types of action should be taken, filing is simultaneous or nearly so, since the evi-

dence to support both the criminal prosecution and the civil proceeding is in our hands and we feel it our obligation to institute proceedings expeditiously.

It is not our policy to ask a court to suspend civil proceedings until disposition is made of a criminal action. As an ordinary matter preliminary motions in both proceed contemporaneously. Calendars of the courts being what they are, however, civil cases are as a rule slower to come on for trial than criminal. As a matter of actual practice the defendant generally requests that the criminal action be tried first and this is his right as he is entitled to as speedy a trial of the criminal charge as is possible. Normally, too, the defendant is reluctant, as is the Government, actually to conduct two trials of the same facts and issues concurrently.

In the criminal case, the defendant also has the advantage of a higher degree of proof. Thus *he usually* prefers to have the criminal case tried first. See, however, the *Costello* Tax Case decision.

We hope that this satisfactorily answers your query. If you have any further comment, please do not hesitate to let us know.

Sincerely yours,

STANLEY N. BARNES
Assistant Attorney General
Antitrust Division
Antitrust Division

Books

Thorelli, Hans B., THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION, Johns Hopkins Press, Baltimore, Md. (1955).

Hans Thorelli's scholarly work traces the development of the Sherman Act through 1903. Despite the limited time period covered, the book provides an extremely valuable addition to our growing antitrust literature. Heretofore unavailable material is brought together to cast light on the background and philosophy of the Sherman Act, and to demonstrate that "the central characteristics and problems of antitrust policy had already appeared by . . . 1903." As Corwin

Edwards points out in his foreword, the comprehensiveness of Mr. Thorelli's research enables him to argue persuasively that many generally accepted views about the Sherman Act have little basis in fact. Both the lawyer and the economist will find the all-inclusive bibliography an invaluable tool for future research.

I. M. S.

Stelzer, I. M., SELECTED ANTITRUST CASES: LANDMARK DECISIONS IN FEDERAL ANTITRUST LAW, Richard D. Irwin, Inc., Homewood, Ill. (1955), Pp. 210, $3.50.

Landmark decisions in Federal Antitrust action have been compiled in one volume for the first time to provide a useful teaching aid for courses in Government Regulation of Business, Public Policy Toward Business, and for the Government and Business portion of Principles courses, offered in departments of Economics, Political Science, and Business Administration. This new book makes available in a single, brief casebook, material that has previously been difficult to obtain.

Excerpts from 34 decisive and historic cases in antitrust action, carefully selected and edited, are presented to provide invaluable supplementary material to students, offering a real basis for understanding the legal and economic significance of antitrust decisions. The case material is limited to the pertinent portions of each case where the critical points of each issue are decided.

Barger, Harold, DISTRIBUTION'S PLACE IN THE AMERICAN ECONOMY SINCE 1869, Princeton University Press, Princeton, N. J. (1955), Pp. 222, $4.50.

Lyons, Barrow, TOMORROW'S BIRTHRIGHT: A POLITICAL AND ECONOMIC INTERPRETATION OF OUR NATURAL RESOURCES, Funk and Wagnalls Co., New York 10, N. Y. (1955), Pp. 424, $5.00.

Adams, W. and Gray, H. M., MONOPOLY IN AMERICA: THE GOVERNMENT AS A PROMOTER, The MacMillan Company, New York (1955), Pp. 221.

Wilcox, Clair, PUBLIC POLICIE TOWARD BUSINESS, Richard D. Irwin, Inc., Homewood, Ill. (1955), Pp. 898, $6.50.

Activities

The Report of the Attorney General's Committee will once again be the subject under discussion when antitrust enthusiasts meet. At its 68th Annual Meeting, the American Economic Association will consider the REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ANTITRUST POLICY. The meeting will take place on Thursday, December 29, 1955 at the Commodore Hotel in New York City, 9:30 A. M.

This gathering should prove of great interest since the topic's interest will be enhanced by the following personalities: Corwin D. Edwards of the University of Chicago, who will grasp the gavel; Edward S. Mason of Harvard and Clair Wilcox of Swarthmore furnishing papers and a discussion group composed of George W. Stocking of Vanderbilt, Alfred E. Kahn of Cornell, Clare E. Griffin of Michigan and George J. Stigler of Columbia.

It seems that Corwin Edwards is a busy man these days. Not only will he participate in the aforementioned Economic group meeting but had also participated in the Annual Symposium on Trade Regulation conducted by the Federal Bar Association of New York, New Jersey and Connecticut. As announced in the last issue of the Bulletin, the symposium was entitled TWENTY YEARS OF ROBINSON-PATMAN—RECORDS AND ISSUES. In addition to Dr. Edwards, speakers present included Joseph W. Burns, Cyrus Austin, Abraham Lowenthal and Lawrence Apsey.

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Carman, W. B., "Analysis of Chapter VIII: Antitrust Administration and Enforcement," SYMPOSIUM ON THE REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE, American Bar Association Annual Meeting, Phila., Pa., Aug. 22-24, 1955, pp. 148-169 (American Bar Association, 1155 E. 60th St., Chicago 37, Ill.), $2.50 per copy.

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Note, AN APPRAISAL OF THE ATTORNEY GENERAL'S COMMITTEE'S VIEWS ON THE ROBINSON-PATMAN COST JUSTIFICATION DEFENSE, 24 Geo. Wash. L. Rev. 109 (Oct., 1955). Geo. Wash. L. Rev., Third and Reily Streets, Harrisburg, Pa., $1.00 per copy.

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